Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF TEXAS,
Petitioner,

v.

ROBERT BURNS SPRINGSTEEN, IV,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Framers of the United States Constitution intend that an accused ~~person's right~~ "to be confronted with the witnesses **against** him" prohibit the admission of solely self-incriminating statements by an out-of-court declarant that made no allusions to the existence of another party?

2. Did the Court of Criminal Appeals err when it failed to consider what the "damaging potential" of cross-examination would have yielded, an inquiry which should have been the first step of a harm analysis under *Delaware v. Van Arsdall,* 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
SUMMARY OF THE ARGUMENTS	7
I. PROHIBITED STATEMENTS SHOULD BE ACCUSATORY	8
II. VAN ARSDALL HARM ANALYSIS NOT FOLLOWED	16
A. The *Van Arsdall* Harm Analysis	16
B. Calculating The Damaging Potential Of The Denied Confrontation	20
C. What Would The Crucible Of Respondent's Cross-Examination Of Scott Have Revealed?	23
D. *Van Arsdall* Second Prong Factors	27
CONCLUSION	29
APPENDICES	
Appendix A: The Majority Opinion and Dissenting Opinions of the Texas Court of Criminal Appeals In *Robert Burns Springsteen, IV, v. State*, No. AP-74,223, Rendered May 24, 2006	1a

TABLE OF CONTENTS—Continued

Page

Appendix B: Postcard denying State's Motion for Rehearing *Robert Burns Springsteen, IV, v. State*, No. AP-74,223, on September 27, 2006 ..... 41a

Appendix C: Excerpts from Michael Scott's taped statements 42a

Appendix D: The Redacted Written Statement of Michael Scott as read to the jury at the trial of Robert Springsteen (State's Exhibit 380) 83a

Appendix E: The Full (Un-Redacted) Written Statement of Michael Scott admitted for the record only at the trial of Robert Springsteen (State's Exhibit 379) 88a

TABLE OF AUTHORITIES

CASES — Page

Bohsancurt v. Eisenberg, 129 P.3d 471, 477 (Ariz. Ct. App. 2006) 12
Bruton v. United States, 391 U.S. 123, 124, 88 S. Ct. 1620, 20 L .Ed. 2d 476 (1968) 10
Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L. Ed. 2d 705 (1967) 17, 19
Crawford v. Washington, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004) ..... *passim*
Davis v. State, No. PD-1309-05, 2006 Tex. Crim. App. LEXIS 1978 (Tex. Crim. App. 2006) ... 18, 19, 21
Davis v. Washington and Hammon v. Indiana, 547 U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) ..... *passim*
Delaware v. Van Arsdall, 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986) ..... *passim*
Douglas v. Alabama, 380 U.S. 415, 416-17, 85 S. Ct. 1074, 13 L.Ed.2d 934 (1965) 10
Dowdell v. United States, 221 U.S. 325, 332-331, 31 S. Ct. 590, 55 L. Ed. 753 (1911) 13
Green v. DeMarco, No. 2005/09951, 2005 NY Slip Op 25528, 13-14, 812 N.Y.S.2d 772, 2005 N.Y. Misc. LEXIS 2776 (N.Y. Sup. Ct. Dec. 12, 2005) 11
Harrington v. California, 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969) 16, 17, 21
In re Springsteen, No. AP-74,223 (filed September 27, 2006) (avail. 2006 Tex. Crim. App. LEXIS 1881) 1
Lee v. Illinois, 476 U.S. 530, 536-37, 106 S. Ct. 2056, 90 L.Ed.2d 514 (1986) 10
Lilly v. Virginia, 527 U.S. 116, 121-22, 119 S. Ct. 1887, 144 L.Ed.2d 117 (1999) 10
McClellan v. United States, 706 A.2d 542, 548 (D.C. 1997) 22

TABLE OF AUTHORITIES—Continued

Page

New York v. Quarles, 467 U.S. 649, 658-659, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984)..... 14
Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)..... 8, 25
Richardson v. Marsh, 481 U.S. 200, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987)..... 15
Robert Burns Springsteen, IV, v. State, No. AP-74,223 (filed May 24, 2006) (avail. 2006 Tex. Crim. App. LEXIS 2340) ..... *passim*
Roberts v. Russell, 392 U.S. 293, 293, 88 S. Ct. 1921, 20 L.Ed.2d 1100 (1968)..... 10
Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)..... 5
Ryan v. Miller, 303 F.3d 231, 248 (2d Cir. 2002). 12, 14
Schneble v. Florida, 405 U.S. 427, 31 L. Ed. 2d 340, 92 S. Ct. 1056 (1972)..... 17
Shelby v. State, 819 S.W.2d 544, 547 (Tex. Crim. App. 1991)..... 18, 22
Tennessee v. Street, 471 U.S. 409, 105 S. Ct. 2078, 85 L.Ed.2d 425 (1985)..... 26
U.S. v. Stewart, 93 F.3d 189 (5th Cir. 1996) 22

OTHER AUTHORITIES

Mosteller, Robert P., "Testimonial" and the Formalistic Definition - The Case for an "Accusatorial" Fix, 20 Crim. Just. R. 14 (2005)..... 13
Mosteller, Robert P., Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 747-755, n. 277 12

TABLE OF AUTHORITIES—Continued

RULES Page

TEX. R. APP. P. Rule 44.2(a) 17
Texas Rule of Evidence 803(24) 26

CONSTITUTIONAL PROVISIONS

Sixth Amendment to the United States Constitution ..... *passim*

PETITION FOR A WRIT OF CERTIORARI

The State of Texas respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The unpublished decision of the Texas Court of Criminal Appeals, *Robert Burns Springsteen, IV, v. State*, No. AP-74,223 (filed May 24, 2006) (avail. 2006 Tex. Crim. App. LEXIS 2340), including the majority opinion and the dissenting opinion of Keller, J., is reproduced at App. A, *infra*. The unpublished notice of the Texas Court of Criminal Appeals denying State's Motion for Rehearing, *In re Springsteen*, No. AP-74,223 (filed September 27, 2006) (avail. 2006 Tex. Crim. App. LEXIS 1881), is reproduced at App. B, *infra*.

JURISDICTION

The Texas Court of Criminal Appeals issued an opinion on May 24, 2006 reversing Respondent's conviction for capital murder. *Robert Burns Springsteen, IV, v. State*, No. AP-74,223, 2006 Tex. Crim. App. LEXIS 2340 (filed May 24, 2006). The Court of Criminal Appeals denied the State's Motion for Rehearing on September 27, 2006. *In re Springsteen*, No. AP-74,223 (filed September 27, 2006). Jurisdiction of this Court is properly invoked pursuant to 28 USCS § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution, in pertinent part, provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. . . .

STATEMENT OF THE CASE

A Travis County Grand Jury indicted Respondent for the capital murder of thirteen-year-old Amy Ayers. (CR I 4). Amy Ayers was one of four teenaged girls who were brutally murdered on December 6, 1991. The girls were stripped naked, bound and gagged, and some of the girls were sexually assaulted. All were shot execution style in the back of an "I Can't Believe It's Yogurt" shop in Austin, Texas. The bodies and the place of business were then set on fire. The indictment alleged that Respondent intentionally caused the death of Amy Ayers by shooting her with a firearm, a deadly weapon, or strangling her with a ligature, a deadly weapon, in the course of committing or attempting to commit robbery and/or burglary. (CR I 4; CR III 453).

At trial in 2001, the State introduced the redacted statement of Respondent's codefendant and roommate, Michael Scott. Austin Police Detective Robert Merrill interviewed Michael Scott on September 9, 10, 12 and 14, 1999.[1] On September 14, 1999, Austin Homicide Detective Manuel Fuentes met with Michael Scott outside a Grandy's Restaurant at 8:43 a.m. so that Scott could memorialize his statements in writing. (RR 53: 159-160). Fuentes did not have a warrant for Scott's arrest, and Scott was not handcuffed, arrested, or placed in custody. (RR 53: 161). Scott voluntarily accompanied Fuentes to his office to give a written statement. (RR 53: 161-162). Fuentes read Scott his Miranda rights, which Scott understood and waived. (RR 53: 163). Fuentes did not threaten Scott or promise him anything in exchange for his statement. (R 53: 163). During the course of his statement, Scott was free to leave the interview room on his own, go outside, and smoke cigarettes. (RR 53: 164).

After Scott completed his statement, Fuentes read it to him and allowed him to make corrections. Scott initialed each

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[1] Excerpts from these recorded interviews are attached at App. C.

page of his statement and signed the document in the presence of civilian witnesses. (RR 53: 165-166). After Scott gave his statement, Fuentes drove him back to his car. Scott was arrested weeks later. (RR 53: 177).[2]

Defense counsel filed a brief with the trial court arguing, in part, that the admission of Scott's statement would violate the Confrontation Clause of the Sixth Amendment. (CR III 394-403, 405-421). The trial court redacted the statement to make it exclusively self-inculpatory, and ultimately overruled Respondent's objections. (RR 53: 132-144). Scott's full written statement was admitted for the record only as SX 379. (RR 53: 166). All references to Respondent were redacted from Scott's statement, and this redacted version of SX 379 was also admitted for the record only as SX 377. (RR 53: 167). Detective Fuentes then read the redacted statement (SX 377) to the jury. The court reporter made a written transcription of the statement as read by Fuentes and that transcription was admitted into evidence before the jury. (RR 53: 175).[3] The State and the defense agreed that Scott would invoke his Fifth Amendment right if called to testify in this case. (RR 53: 203).

In the redacted statement, Scott said that he served as a lookout at the front of the yogurt shop during the robbery. (RR 53: 171). At one point he went to the back of the store and saw that all of the girls were naked. He tied them up using their bras and clothing. (RR 53: 171). He attempted to rape one of the girls. (RR 53: 172). He admitted shooting two of the girls. (RR 53: 172). After the girls were dead, he stacked one girl on top of another. (RR 53: 172). He gathered napkins, cups, paper towels, and piled them on top of the three girls. (RR 53: 172). He emptied a can of Zippo lighter fluid on them and set them afire with a Zippo lighter. He

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[2] Michael Scott's full written confession is attached at App. E.

[3] This transcription of Scott's redacted statement is attached at App. D.

remembered the "whoosh" sound when the accelerant caught fire. (RR 53: 172). After the murders, Scott drove to a bridge and threw up over the side of the bridge. (RR 53: 173). He also threw a knife from the yogurt shop over the bridge. (RR 53: 173). He described two guns that were used in the murders. (RR 53: 173). He said he had also confessed his involvement in these murders to his father and to his best friend, Patrick Davidson. (RR 53: 169).

The State presented extensive other evidence at trial, including Respondent's own videotaped, voluntary, non-custodial statement confessing his involvement in the yogurt shop murders. (RR 49: 103; SX 296, 297, 298). Respondent's videotaped statement was played for the jury and Detective Merrill reviewed the statement with the jury. (RR 50: 11-15). Respondent gave a lengthy rendition of what he did on December 6, 1991. He initially denied involvement in the murders, but finally admitted being near the yogurt shop, then being in it, and then participating in the murders. (RR 49: 138). Respondent admitted entering the yogurt shop earlier that evening along with Scott and two others. He said that he and Scott surreptitiously made their way to the back door, and that he put either a rock or a folded cigarette pack in the door so that, while it appeared to be locked, it actually could be opened from the outside. (RR 49: 139).

Respondent told police that two weapons were used in this offense: a .22 revolver and a silver .380 semiautomatic. (RR 49: 138-139). The information regarding the weapons was significant, as it matched the evidence from the crime scene. (RR 49: 139-140). Respondent admitted that he shot one victim with the .380; the criminal investigation revealed that Amy Ayers was shot with a .380. (RR 49: 140). He illustrated with his arms and body the position of Amy's body at the time he shot her. (RR 49: 141). Amy's burned body was found just as described. Respondent also admitted in graphic

terms that he had sex with one victim, but did not ejaculate. (RR 49: 140).

The jury returned a general verdict of guilty of capital murder. (CR III 459). Based upon the jury's answers to the three punishment issues submitted, the trial judge sentenced Respondent to death. (CR III 465-467; RR 61: 12).[4]

In his brief on direct appeal to the Texas Court of Criminal Appeals, filed on October 18, 2002, Respondent alleged, among other claims, that the admission of the redacted excerpts of Scott's written confession violated the Confrontation Clause. The State responded in its brief, filed on April 15, 2003, that Scott's statement was wholly self-inculpatory, fell within a firmly rooted hearsay exception (statement against penal interest), and bore particularized guarantees of trustworthiness.

On March 8, 2004, this Court decided *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004). The next day, Respondent filed a supplemental letter brief alerting the Court of Criminal Appeals to this Court's holding in *Crawford*. Respondent argued that, because Michael Scott's statement was given in response to police interrogation, it was "testimonial" under *Crawford, supra,* and therefore violated the Confrontation Clause. The State responded in a letter brief filed on April 2, 2004, that *Crawford v. Washington* was distinguishable. The State noted that *Crawford* involved an out-of-court statement that was clearly accusatory of the defendant and given as a result of custodial interrogation, whereas the redacted version of Scott's statement admitted at trial was solely self-incriminating and qualified as a statement against penal interest. Thus, Scott was not a "witness against" the respondent as contemplated

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[4] Texas Governor Rick Perry commuted Respondent's sentence to life imprisonment after this Court's decision in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

by the Sixth Amendment. In addition, the State argued that, unlike the declarant in *Crawford*, Scott was not in custody at the time he made his statement to the police.

The State followed up on September 9, 2004, with a post-submission brief addressing *Crawford v. Washington* and harmless error. The State argued that the trial court's admission of Scott's redacted statements did not implicate a "core concern" of the Confrontation Clause because his statements did not accuse the respondent of criminal activities. The State also argued that the respondent was not harmed by any error arising from the admission of Scott's statements. The State emphasized its compelling evidence at trial, including the respondent's own confession.

On October 4, 2004, the State filed a supplemental post-submission brief further developing its harmless error argument. In particular, the State argued in this brief that the failure to allow cross-examination of Michael Scott was not harmful because Scott's live testimony—and the resulting impeachment—would have been more detrimental to Respondent than was the redacted confession. The State provided excerpts from Scott's recorded interviews to show the compelling material with which Scott would have been impeached via cross-examination.

On May 24, 2006, the Court of Criminal Appeals issued its opinion reversing Respondent's conviction. *Springsteen v. State*, No. AP-74,223, 2006 Tex. Crim. App. LEXIS 2340 (Tex. Crim. App., decided May 24, 2006) (not designated for publication). The court held that, because Scott's statement was taken by police officers in the course of an interrogation, it was testimonial. After finding a Confrontation Clause violation, the court held that it could not say, beyond a reasonable doubt, that the admission of Scott's statements did not affect the jury's determination of Respondent's guilt. *Id.*

On June 9, 2006, the State filed a motion for rehearing contending that the Court of Criminal Appeals had errone-

ously omitted the first prong of the harmless error analysis prescribed by this Court for Confrontation Clause errors. See *Delaware v. Van Arsdall*, 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986) ("assuming that the damaging potential of the cross-examination were fully realized"). Further, the State again argued that Scott's statement should not be considered "testimonial" under *Crawford* because it did not accuse Respondent of any misconduct.

On September 27, 2006, the Court of Criminal Appeals denied the State's motion for rehearing. Mandate issued on October 12, 2006.

REASONS FOR GRANTING THE PETITION

SUMMARY OF THE ARGUMENTS

1. The Framers of the United States Constitution intended that an accused person's right "to be confronted with the witnesses **against** him" was meant to ensure that he would be able to challenge *accusatory* statements introduced against him. Therefore, the Texas Court of Criminal Appeals erred in finding fault in the admission of solely self-incriminating statements by an out-of-court declarant that did not mention the accused or even refer to the existence of another party. Such statements should not be prohibited as "testimonial" under *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004). This is an important question of federal law that has not been, but should be, settled by this Court.

2. The Texas Court of Criminal Appeals erred when it failed to consider what the "damaging potential" of cross-examination would have yielded, an inquiry that should have been the first step of that court's harm analysis under *Delaware v. Van Arsdall,* 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986). Thus, the Court of Criminal Appeals has decided an important federal question in a way that conflicts with a relevant decision of this Court.

I. PROHIBITED STATEMENTS SHOULD BE ACCUSATORY

According to the Sixth Amendment, "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." In rejecting the *Ohio v. Roberts*[5] test, the Court re-examined the history behind the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354, 1359-1363 (2004). First, the Court concluded that the Framers were concerned with the use of ex parte examinations as evidence against criminal defendants, so the Court rejected any notion that the Confrontation Clause is only applicable to in-court testimony. *Id,* at 1364. Rather, the Court stated that such an interpretation would leave the Clause "powerless to prevent even the most flagrant inquisitorial practices." On the other hand, not all hearsay implicates the "core concerns" of the Confrontation Clause. *Ibid.* The Court settled on the view that the core concern of the Confrontation Clause is to guard against use of "testimonial" evidence without the opportunity for cross-examination:

> Various formulations of this core class of testimonial statements exist: "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.

Id. at 1364.

Satisfied that parameters could be developed subsequently, the Court stated that:

> We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else

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[5] *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

> the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.

Id., at 1374.

Subsequently, in *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court offered more guidance concerning when "'statements taken by police officers in the course of interrogations'" qualified as "'testimonial' statements." *Id.* (quoting *Crawford*, 541 U.S. at 52). The Court ruled that, concerning excited statements made to law enforcement officers, "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* (emphasis added). The Court ruled that statements to a 911 operator (acting as a law enforcement agent) describing an ongoing domestic disturbance and identifying the assailant were nontestimonial because the statements were made "to describe current circumstances requiring police assistance." *Id.* at , 126 S. Ct. at 2276-77. However, statements describing events that already had ended were testimonial because the "interrogation was part of an investigation into possibly criminal past conduct . . . ." *Id*, 126 S. Ct. at 2278-79.

The instant case presents an appropriate set of circumstances to further refine the definition of "testimonial" and to consider the boundaries of "interrogation." It is evident that the State's use of Michael Scott's redacted confession presents a fundamentally different issue than that addressed in *Crawford* or *Davis/Hammon*. Unlike the present case, the statements in *Crawford* and *Davis/Hammon* accused the perpetrator of misconduct.

From this undisputed fact comes Petitioner's primary position: Hearsay statements that are "testimonial" under *Crawford* must necessarily be *accusatory* of the defendant.

Various forms of the root word "accuse" appear in the majority opinion in *Crawford* twenty-seven times. While it is true that the Court did not explicitly delineate as "testimonial" only those portions of statements that are accusatory in nature, it is difficult, if not impossible, to read the opinion without realizing that the Court was preoccupied with the evils of trial by ex parte accusations.

This Court in *Crawford* cited five prior Supreme Court cases in which it prohibited the use of accomplices' statements where the defendant had no opportunity to cross-examine the accomplice. *Id*, at 1367-68, citing *Roberts v. Russell*, 392 U.S. 293, 293, 88 S. Ct. 1921, 20 L.Ed.2d 1100 (1968); *Bruton v. United States*, 391 U.S. 123, 124, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968); *Lee v. Illinois*, 476 U.S. 530, 536-37, 106 S. Ct. 2056, 90 L.Ed.2d 514 (1986); *Douglas v. Alabama*, 380 U.S. 415, 416-17. 85 S. Ct. 1074, 13 L.Ed.2d 934 (1965); *Lilly v. Virginia*, 527 U.S. 116, 121-22, 119 S. Ct. 1887, 144 L.Ed.2d 117 (1999). In the first three cases accomplices' accusatory statements were introduced against the defendants at joint trials, and in the last two cases such statements were introduced during the defendants' separate trials. In *Lilly* the trial court admitted in their entirety two accomplice statements accusing the defendant of masterminding robberies and murdering the victim.

The *Crawford* Court's assumption that such statements would be accusatory is the backbone of the analysis. Petitioner believes that the Court's articulation of the basic tenets of "testimonial" necessarily assumes that such declarants would be describing facts that accuse the defendant of criminal activity. The *Davis/Hammon* Court subsequently noted that:

> When we said in *Crawford*, supra, at 53, 124 S. Ct. 1354, 158 L. Ed. 2d 177, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely di-

> rected at establishing the facts of a past crime, *in order to identify (or provide evidence to convict) the perpetrator*. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.

Id, 126 S. Ct. at 2276 (emphasis added).

This assumption of accusation is consistent with the "core concern" of the Confrontation Clause: to prohibit trial by ex parte affidavit or statement. See *Crawford*, 124 S. Ct. 1363-1365. The *Crawford* holding applies to situations in which the Confrontation Clause has been triggered. *Inherently, statements do not trigger the Clause unless they accuse the defendant of some wrongdoing.* "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id*, at 1364 (emphasis added). As this Court noted, Sir Walter Raleigh insisted, in vain, that he be permitted to confront the man accusing him of treason: "(L)et him speak it. Call my accuser before my face." *Id*, at 1360. Without question, this accusatory characteristic underlay the *Crawford* Court's analysis, and has continued as the lynchpin in *Davis* and *Hammon*. The precise issue now before the Court is whether this new paradigm acknowledges that specific, solely self-incriminating assertions made within a broader statement should not be viewed as "testimonial" since, at the moment of formulation, they were not "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 126 S. Ct. at 2276.

Other courts and commentators have held that to implicate Confrontation Clause concerns, the statements at issue must be accusatory in some fashion. See *Green v. DeMarco*:

> Moreover, the focus of the required inquiry under *Crawford* is upon the historical foundation of the Confrontation Clause, 124 S. Ct. at 1363, and the evi-

> dence at issue here bears little resemblance to the evidence that has triggered confrontation problems in the past. First, neither document in question accuses anyone of conduct that is criminal. They are neutral in character, relating only to the operation of the breath test instrument and the reference solution used to calibrate it. The ex parte statement at issue in *Crawford* was inculpatory in that it refuted the defendant's claim of self-defense. . . . So too was the hearsay evidence in the *Raleigh* case as it involved an accusation of treason. Commentators have suggested that confrontation concerns historically have been triggered by accusatory statements. . . . Indeed, the Second Circuit has said that: "The Confrontation Clause targets only that testimony that contains accusations against the defendant." *Ryan v. Miller*, 303 F.3d 231, 247 (2d Cir. 2002).[6]

No. 2005/09951, 2005 NY Slip Op 25528, 13-14, 812 N.Y.S.2d 772, 2005 N.Y. Misc. LEXIS 2776 (N.Y. Sup. Ct. Dec. 12, 2005) (most citations omitted).

The proposed text leading up to the Confrontation Clause also suggests that the Framers intended to proscribe the out-of-court statements of *accusers*, rather than all out-of-court statements. In particular, the proposed amendments to the Constitution that James Madison introduced in the First Congress would have guaranteed an accused the right "to be confronted with his accusers, and the witnesses against him." Mosteller, Robert P., Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 747-755, n. 277. And the Virginia Bill of Rights guaranteed the right "to be con-

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[6] Compare also *Bohsancurt v. Eisenberg*, 129 P.3d 471, 477 (Ariz. Ct. App. 2006), holding that breathalyzer machine calibration records are business records not barred by the Confrontation Clause. The Arizona court noted that other courts have permitted the admission of similar records, without testimony from their preparer, by concluding that the evidence set forth in the records is not "against" any defendant.

fronted with the accusers and witnesses." *Id.* The reference to accusers was perhaps dropped from the final version in the Federal Constitution because, with the addition of the term "against him," it was seen as redundant. *Id.*

In fact, this Court long ago suggested that the Confrontation Clause does not proscribe the admission of evidence that does not involve some inquiry into the guilt or innocence of the accused. In *Dowdell v. United States*, holding that the defendants' Confrontation Clause rights were not violated when court personnel supplemented the record, this Court observed that the officials:

> (W)ere not witnesses against the accused within the meaning of this provision of the statute. *They were not asked to testify to facts concerning their guilt or innocence*,—they were simply required to certify . . . as to certain facts regarding the course of trial(.)

Dowdell v. United States, 221 U.S. 325, 332-331, 31 S. Ct. 590, 55 L. Ed. 753 (1911) (emphasis added).

This Court's formulation of the meaning of "testimonial" in *Crawford* and *Davis/Hammon* is not inconsistent with the notion that the Confrontation Clause applies only to portions of statements that are accusatory concerning the defendant. Petitioner suggests that a reviewing court must simply make an initial inquiry as to whether the challenged evidence is accusatory in any manner. "Accusatory," like "interrogation," would be given its common and ordinary meaning. One commentator has suggested that accusatory statements are statements that are accusations, viewed at the time they were made, of conduct that is criminal. Mosteller, Robert P., "Testimonial" and the Formalistic Definition - The Case for an "Accusatorial" Fix, 20 Crim. Just. R. 14 (2005). Statements obtained via police interrogation would then be inadmissible under *Crawford* where the witness is not made

available for cross-examination, to the extent that they include any remarks accusing the defendant of misconduct.[7]

In practice, then, the interpretation proposed by Petitioner would have narrow applicability. In order to show that statements obtained as a result of police interrogation did not implicate the Confrontation Clause, the prosecution would need to show that all direct and indirect references to a defendant had been removed. The remaining comments would be non-accusatory because, when the declarant made these particular self-incriminating remarks, he was not accusing the defendant of any illegal conduct. For example, Scott's redacted statement consisted of assertions such as "I pointed the gun at her and tried to shoot at first but couldn't. I pointed the gun again at the girl and fired once into her head." (App. D).

The non-accusatory portions would not be prohibited by the Confrontation Clause, though they might be inadmissible under some other rule or provision. As to any accusatory portions of the declarant's statement, the trial or appellate court would then analyze whether they were "testimonial" under *Crawford*, *Davis/Hammon*, and their progeny.

Davis explicitly recognized the utility of removing assertions made with an awareness that they provide evidence to convict another party:

> Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," *New York v. Quarles*, 467 U.S. 649, 658-659, 104 S. Ct. 2626, 81 L.

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[7] See *Ryan v. Miller*, 303 F.3d 231, 248 (2d Cir. 2002) ("Testimony need not contain an explicit accusation in order to be excluded as a violation of the Confrontation Clause. 'To implicate the defendant's confrontation right, the statement need not have accused the defendant explicitly but may contain an accusation that is only implicit.'")

> Ed. 2d 550 (1984), trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through in limine procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.

Davis, 126 S. Ct. at 2277.[8]

In the present case, while Michael Scott's redacted statement (App. D) may at first glance seem to qualify as "testimonial" because it was derived from police questioning, Scott was not being a "witness( ) against" Respondent when he was making solely self-inculpatory remarks. The redacted statement read into evidence is completely non-accusatory and does not remotely refer to Respondent or any other actor. (RR 51: 49-50). For this reason the statement could even be viewed as exculpatory because the account makes Scott appear to be the sole actor in the murders. It is true that, by corroborating what Respondent told investigators, the statement indirectly supported the prosecution. It seems to Petitioner, though, that this purely corroborative characteristic of Scott's redacted statements is far removed from the "core concern" of the Sixth Amendment; the statements accused Respondent of nothing. They may have been evidentiary, in the sense that fingerprints would have been evidentiary, but they were not accusatory.

Petitioner contends that this function of Scott's statement simply cannot be a core concern of the Confrontation Clause. Again, the core concern of the Confrontation Clause is to

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[8] Additionally, this practice of redacting the statement to eliminate accusatory remarks will be familiar to prosecutors and courts, as this was often necessary under pre-*Crawford* jurisprudence. See *Richardson v. Marsh*, 481 U.S. 200, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987) (this Court held that use of a codefendant's hearsay confession does not violate the confrontation clause where a proper limiting instruction is given and the confession is redacted to eliminate any reference to his or her existence).

protect a criminal defendant from the statements of unavailable declarants who accuse the defendant of something. Because Scott's redacted confession contained no accusatory statements, express or implied, against Respondent, the Confrontation Clause was not triggered by its admission into evidence.

In sum, Petitioner asks this Court to address whether the Framer's intention in writing the Confrontation Clause was to allow a defendant to confront his *accusers,* and whether the Framers would have considered solely self-incriminating assertions made in a conversation or document to be *accusatory* of a defendant. Petitioner suggests that the Framers would not have sought to bar admission of wholly self-incriminating statements that neither reference the defendant nor even mention the existence of an accomplice.

II. VAN ARSDALL HARM ANALYSIS NOT FOLLOWED

A. The *Van Arsdall* Harm Analysis

In *Harrington v. California*, 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969), this Court expressly rejected the claim that the admission into evidence of a statement made by a non-testifying codefendant "can never be harmless." *Delaware v. Van Arsdall*, 475 U.S. 673, 682, 89 L. Ed. 2d 674, 685, 106 S. Ct. 1431, 1437 (1986), citing *Harrington*, 395 U.S. at 254. In *Van Arsdall*, this Court confirmed that "the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." *Van Arsdall*, 475 U.S. at 682-684.

The Court established a three-prong analysis for reviewing courts to follow in assessing the harm from the denial of an opportunity to cross-examine an adverse witness. *Id*, 475 U.S. at 684. First, the reviewing court assumes that the damaging potential of the cross-examination were fully

realized. *Id.* Second, with that assumption in mind, the court reviews the error in connection with the following factors:

> 1) The importance of the witness' testimony in the prosecution's case;
>
> 2) Whether the testimony was cumulative;
>
> 3) The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;
>
> 4) The extent of cross-examination otherwise permitted; and,
>
> 5) The overall strength of the prosecution's case.

Id. Finally, in light of the first two prongs, the court determines if the error was harmless beyond a reasonable doubt. *Id*; see also *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L. Ed. 2d 705 (1967); TEX. R APP. P. 44.2(a).

Significantly, the *Van Arsdall* Court cited *Harrington* and *Schneble v. Florida*, 405 U.S. 427, 31 L. Ed. 2d 340, 92 S. Ct. 1056 (1972), for the purpose of illustrating the distinct analysis necessary for this type of error. This suggests that the Court was attempting to bring a distinctive organization and structure to Confrontation Clause harm analysis.

In the instant case, the Court of Criminal Appeals ostensibly followed *Van Arsdall* when assessing harm for the erroneous admission of Michael Scott's redacted statement. See *Springsteen v. State*, No. AP-74,223, 2006 Tex. Crim. App. LEXIS 2340, slip op. at n. 19, n. 21 (Tex. Crim. App., decided May 24, 2006) (not designated for publication). The court set out the five factors from the second prong of *Van Arsdall*, yet completely skipped the first step of the analysis. In other words, the court did not make any attempt to "assume that the damaging potential of the cross-examination were fully realized," and did not even mention the existence of this first step of the analysis, despite the court's adoption of the

Van Arsdall procedure for Confrontation Clause violations in 1991.[9] *Id*, slip op. at *14-*25.

The Court of Criminal Appeals did not discuss or explain its choice not to follow the first step prescribed by *Van Arsdall*. However, the court's internal reasoning is apparent upon reading a subsequent decision regarding a similar retroactive application of *Crawford v. Washington*. See *Davis v. State*, No. PD-1309-05, 2006 Tex. Crim. App. LEXIS 1978 (Tex. Crim. App. 2006).

In *Davis*, the court explained why it now refuses to follow the first step of the *Van Arsdall* harm analysis procedure for *Crawford* error:

> Most of these [*Van Arsdall*] factors apply regardless of whether the constitutional error was in the admission or exclusion of evidence. But the initial "assumption" that the damaging potential of the cross-examination had been realized applies only when the trial court restricts cross-examination or excludes evidence. In those instances, the reviewing court must determine whether it is convinced, beyond a reasonable doubt, that the fact-finding process was reliable even if the improperly restricted or excluded evidence is factored into the analysis. But when the error involves the admission of evidence in violation of the Confrontation Clause, reviewing courts may not speculate as to whether cross-examination would have been effective or not, had it occurred. . . .
>
> We therefore take this opportunity to clarify that the *Van Arsdall* initial assumption ("that the damaging potential of the cross-examination were fully realized") applies to confrontation errors of exclusion, not confron-

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[9] The Texas Court of Criminal Appeals mandated the *Van Arsdall* harm analysis procedure for analyzing Confrontation Clause violations in Texas cases in *Shelby v. State*, 819 S.W.2d 544, 547 (Tex. Crim. App. 1991) ("As this case involves an error in violation of the Sixth Amendment, we must perform the analysis set out in *Van Arsdall*.")

tation errors of admission. On the other hand, most of the non-exclusive list of factors set out in *Van Arsdall* may well be applicable in analyzing whether constitutional error in the admission of evidence is harmless under a *Chapman* analysis.

Thus, courts reviewing whether the error in admitting out-of-court statements in violation of *Crawford* is harmless beyond a reasonable doubt should consider:

(1) The importance of the hearsay statements to the State's case;

(2) Whether the hearsay evidence was cumulative of other evidence;

(3) The presence or absence of evidence corroborating or contradicting the hearsay testimony on material points; and

(4) The overall strength of the prosecution's case.[10]

Of course courts may consider other factors as well, but, in the final analysis, the reviewing court must be convinced, beyond a reasonable doubt, that the admission of *Crawford*-barred testimony would probably not have had a significant impact on the mind of an average juror. Put another way, is there a reasonable possibility that the *Crawford* error, within the context of the entire trial, "moved the jury from a state of non-persuasion to one of persuasion" on a particular issue?

Davis v. State, 2006 Tex. Crim. App. LEXIS 1978, at *13-16, *19-20 (Tex. Crim. App. 2006).

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[10] The court noted that it was omitting factor four of the second step set out in *Van Arsdall* ("the extent of cross-examination otherwise permitted") because, in this type of case, no cross-examination has been allowed. In thus holding, the court assumed that the only cross-examination that this Court would find relevant to the assessment of harm from the Sixth Amendment violation was the forbidden cross-examination of the out-of-court declarant. Yet the ability to cross-examine other witnesses, such as individuals who witnessed the declarant making his statement, could conceivably be quite relevant to the question of how much the defendant was harmed by the failure to allow cross-examination of the declarant.

Thus, the Court of Criminal Appeals has explicitly taken the position that it will not contemplate the damaging effect that cross-examination would have had in performing its harm analysis when it views the error as one of admission, rather than exclusion, of evidence. The effect of skipping this first step of the *Van Arsdall* analysis here was that the court focused its attention only on the effect of Michael Scott's statement on the result of the trial, *without directly considering the impact of the very error complained of by Respondent*: the deprivation of the right to cross-examine Scott.

B. Calculating the Damaging Potential of the Denied Confrontation

The Court of Criminal Appeals' approach fails to analyze the effect of the error alleged by Respondent. After all, an out-of-court statement of an accomplice does not inherently violate the Sixth Amendment. Michael Scott's statement would have undeniably been admissible if he could have been produced for either direct or cross-examination. The statement would have been admissible on direct examination under state law as a statement against penal interest with corroborating circumstances, and also as impeachment, if appropriate. See *Crawford*, 541 U.S. at 59, n. 9 ("Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.") The real Confrontation Clause violation in *Crawford* cases is the deprivation of cross-examination of the declarant, not the admission of the out-of-court statement.

Petitioner understands that this type of Confrontation Clause error may be viewed also as an error of admission: if cross-examination is improperly limited, the trial court errs in admitting the testimony that was unable to be tested by cross-examination. Nevertheless, Petitioner submits that *Crawford*-type Confrontation Clause error is more accurately viewed as

an error of omission: the accused is wronged because cross-examination and impeachment were not allowed.[11]

The Court in *Van Arsdall* reasoned that when the procedural crucible of cross-examination has been denied, the appellate court should base its determination of harm according to the situation that would have existed had the evidence been tested properly by cross-examination. *Van Arsdall* thus offers the proposition that the accuracy of an appellate measurement of harm is directly related to the degree to which the damaging potential of cross-examination is discernable.

The court below held in *Davis*, *supra*, that, "when the error involves the admission of evidence in violation of the Confrontation Clause, reviewing courts may not speculate as to whether cross-examination would have been effective or not, had it occurred." However, it is not self-evident why reviewing courts should not be allowed to "speculate as to whether cross-examination would have been effective or not" under these circumstances, but are permitted to consider what cross-examination would have revealed in other cases where cross-examination has been restricted. The court below ignored evidence that unquestionably would have been admitted had the declarant testified. The Texas court saw a reverse image in the mirror and mistook it for realism.

Petitioner suggests that Confrontation Clause harm analysis should not depend on an appellate court's arbitrary designation of the Sixth Amendment violation as improper admission versus improper exclusion. Rather, the implementation of the first step of the *Van Arsdall* analysis by a reviewing court should instead turn on an analysis of the record in each

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[11] Compare *Harrington v. California*, 395 U.S. 250, 253 (U.S. 1969) (where two non-testifying codefendants' confessions were erroneously admitted, this Court analyzed the impact of "the lack of opportunity to cross-examine" the two codefendants, emphasized the overwhelming evidence against the defendant, and also noted that cross-examination of a third codefendant was allowed).

individual case. The reviewing court should ask whether the appellate record indicates the parameters under which cross-examination would have occurred, in a manner that allows the court to estimate the damaging potential of the denied confrontation. Where the record provides so much information that it is akin to an offer of proof regarding the denied cross-examination, the reviewing court has the ability to perform a thorough harm analysis without undue speculation.

For example, in *U.S. v. Stewart*, 93 F.3d 189 (5th Cir. 1996), the Fifth Circuit held that the district court's restriction of cross-examination was "so severe and so swift" that it violated his Confrontation Clause rights. *Id*, 93 F.3d at 194. Yet the Fifth Circuit estimated the "damaging potential" of the denied cross-examination by considering what cross-examination would have revealed. The Fifth Circuit relied on what it had before it—a proffer of questions that defense counsel would have asked had he been permitted. *Id.* In *Shelby v. State*, 819 S.W.2d 544, 547 (Tex. Crim. App. 1991), the Texas Court of Criminal Appeals discussed the "damaging potential" of the denied cross-examination in assessing the harm of the Sixth Amendment violation. The court assumed that the jury would have been fully informed about a pending lawsuit by the witness against the apartment complex (the topic about which cross-examination had been denied). *Id*, 819 S.W.2d at 550.[12]

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[12] Compare also *McClellan v. United States*, 706 A.2d 542, 548 (D.C. 1997). The trial court restricted cross-examination of a critical witness because the witness asserted the Fifth Amendment privilege. *Id.* Nevertheless, the reviewing court was able to draw conclusions about what cross-examination would have revealed because other evidence at trial disclosed the witness's hostility toward the defendant. The court held that, in light of the record, the defendant "was afforded extraordinarily complete and effective substantive means of showing bias." *Id*, 706 A.2d at 548.

These cases illustrate that an appellate court has the ability, where the record provides the necessary facts, to use available evidence to determine the parameters of what the denied cross-examination would have yielded.

C. What would the crucible of Respondent's cross-examination of Scott have revealed?

In the instant case, this Court has an extensive record revealing what the "damaging potential" of the cross-examination of Michael Scott would have revealed. Since Petitioner introduced a videotape of Respondent admitting that he fully participated in the Yogurt Shop rape/robbery/ murder, he invariably would have been in the position of attempting to show that Scott's admissions were coerced, as he also claimed regarding his own confession. The jury would have heard testimony of Michael Scott admitting that he raped one girl and shot two others in the head. If Respondent had been so unfortunate as to live out the charade he now plays, he would have been presented the opportunity to explain why Scott, unbeknownst to the jury, not only incriminated himself but also corroborated Respondent's involvement.

The trial court held a pretrial hearing in order to discuss the proposed admission of Michael Scott's redacted statement. (RR 42:4). The defense questioned at length the officers who met with Scott and took his statements, Detectives Manuel Fuentes, Ron Lara, and Robert Merrill, plus several other witnesses, and also offered exhibits. (See RR 42, 43). This hearing spanning two days of testimony fully developed defense claims that Scott's statement was not credible because it was coerced. Counsel explored the defensive theory that the police used the flawed technique of leaking information about the crime to the suspects. (See RR 43: 16).

The record of this hearing essentially serves as a 'bill of exception' exploring the same subject matter as cross-examination and impeachment would have, had Michael Scott taken the stand.

Counsel asked Detective Fuentes about the length of Scott's initial interrogation at the police station (allegedly 14 ½ hours), whether Scott was told that terminating the interview would be a crime, and whether Detective Merrill held a gun near Michael Scott's head to scare him during the interview (Lara remembered these events differently). (RR 42: 42-46; see also 102-103).[13] Counsel attacked the reliability of Scott's statements, pointing out that, since the detectives were not aware that Scott had been interviewed other officers in 1991, they could not be sure what facts Scott might have learned from other sources. (RR 42: 99). Counsel explored the fact that police had found no physical evidence confirming many of Scott's assertions. (RR 42: 99-100). Detective Lara then read aloud a section of Scott's interview in which he mentioned talking to an attorney. Scott asked the detectives what he should do. He then agreed to talk to the case agent (Detective Merrill) before making a decision about whether to talk to a lawyer.

When Detective Merrill took the stand he denied threatening Scott with a gun and explained that he poked Scott with his finger. (RR 42: 121; 43: 4-7). He also explained that, as soon as Scott asked about an attorney, he questioned Scott until he was satisfied that Scott did not want an attorney at that time and voluntarily desired to continue the interview. (RR 42:121-122). Despite the fact that the line of questioning involved speculation and hearsay, the trial court permitted the defense to question Detective Merrill about concededly false

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[13] Detective Lara's testimony demonstrated Michael Scott's willingness to cooperate with detectives and his apparent motivation to continue conversations and break through his mental barriers. For instance, Lara discussed Scott's conversation with attorney Betty Blackwell advising him to stop talking with police, and his invitation to the detectives to come to his house to discuss the murders. (RR 42: 74-76). At one point, Scott even offered to replace the detectives' faulty tape recorder batteries during the interview in his home. He removed the batteries from his own kitchen "bird clock" and gave them to the detectives. (RR 42: 77).

confessions from others obtained in 1991 and 1992. (RR 43: 17-24).

Counsel also questioned the investigators from 1991. He asked them about the proliferation of purportedly confidential information among teenagers in the area and the false confessions. (See, e.g., 97-106, 117, 135). Petitioner followed up with questions showing that many of the facts the teenagers were talking about were incorrect. Further, Petitioner discussed the motivations of the individuals who falsely confessed (e.g., Alex Briones wanted the reward money for his family and Shawn Smith wanted to receive the death penalty). (See RR 43: 127-131). The two men in Mexico were tortured by Mexican authorities. (RR 43: 173-174). The false confessions contained incorrect facts. (RR 43: 149-153, 165-168, 176-177).

In sum, the testimony and exhibits admitted at this hearing suggest the full range of damaging cross-examination that would have occurred had Michael Scott taken the stand, and set forth some of Petitioner's responses to this evidence.

This Court has before it excerpts from the transcriptions of twenty hours of Scott's conversations with police; his multiple admissions and retractions, finally arriving at acceptance of the horrible crime he had committed. (App. C). The complete transcriptions of these twenty hours were entered into evidence for purposes of the record. These discussions led him to reveal the truth to his tearful father, and to shun an attorney's advice to quit talking to police. The final result was his written confession (App. E) that was redacted and read into evidence. (App. D).

If not for Petitioner's reliance on *Ohio v. Roberts,* Respondent's best-case scenario would have played out in the following manner. Petitioner would have granted Scott use immunity after invocation of his right not to testify. After a hearsay objection, Petitioner would have shown that the redacted statement met the requirements of a declaration

against penal interest under Texas Rule of Evidence 803(24). Petitioner would have offered the redacted statement into evidence and then either would have asked questions or passed the witness. Next, Respondent would have had the opportunity to realize the goal he now claims he desired, which would necessarily have led to one or more of the following:

1. Scott would have testified that his redacted statement was true. Respondent would have tried to draw forth testimony supporting his rather ludicrous claim of coercion. The case then would have been in the posture it is now, minus, of course, the *Crawford* issue.

2. Scott would have retracted his admissions, claiming he was coerced during the week-long interview process.

3. If the second option occurred, Petitioner would then have impeached him with the twenty hours of taped conversations and with his full written confession (not merely the redacted version). See *Tennessee v. Street*, 471 U.S. 409, 105 S. Ct. 2078, 85 L.Ed.2d 425 (1985) (holding that the state could introduce accomplice's entire statement, even though directly implicating defendant, for purpose of rebuttal, where defense theory was that defendant's confession was merely a coerced version of accomplice's confession).

Scott's full written confession (App. E) provides the definitive answer to Respondent's insinuation that he would have benefited from Michael Scott as a witness. The Court may, however, be interested in the recorded interviews in light of the defense claim that they were the fabricated and coerced product of improper suggestion by law enforcement. The excerpts (App. C) show that Scott's statements to police were not coerced and give insight into the tragic process of Scott coming to terms with his own involvement in this horrible crime.

If Scott had been a witness he would have been called upon to explain more fully matters to which he only briefly alluded in his conversations with police, such as 1) the circumstances surrounding his conversations with defense attorney Betty Blackwell and his rejection of her warning against talking to investigators, 2) the conversation in which he told his father that he was in serious trouble for something he had done seven years earlier, and that this brought his father to tears, 3) inviting the detectives inside his home one time and on other occasions walking half a mile to meet them at the highway near his home, 4) telling a detective that he thought the jacket he had worn during the murders was stored with other belongings in a rented storage room, 5) taking detectives on a hunt for the discarded .380 murder weapon, and, 6) guiding detectives in the search for the bridge on which the group stopped shortly after the murders.

By the time Petitioner would have finished confronting Scott with his prior statements and actions, his retraction would have amounted to nothing more than a whisper.

D. *Van Arsdall* Second Prong Factors

Michael Scott's redacted statement to police as admitted at trial was cumulative of other testimony. He had admitted his participation in this crime to witness Amanda Statham. (RR 53: 153). Scott even told Statham some details of the murders. (RR 53: 153). Statham's mother confirmed Statham's testimony. (RR 54: 119).[14]

Further, Scott's statement was not essential to the jury's verdict. Scott's redacted confession did not describe any action of Respondent and did not establish any element of the offense that Petitioner was required to prove. His statement did not even suggest the presence of an accomplice. And a

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[14] The Court of Criminal Appeals held the trial court did not err in admitting Statham's testimony because it was not "testimonial." See *Springsteen*, slip op. at *25-*27.

cursory glance at the redacted statement shows that many of the facts Scott discussed were corroborated by Respondent's confession and other evidence: reading a newspaper in the stolen Pathfinder on the way to San Antonio after the murders (corroborated by confession of Respondent and testimony of Meredith Skipper); propping open the back door prior to the robbery (corroborated by Respondent); going to the bathroom and leaving through the back door (corroborated by Respondent, Dearl Croft, Maria Thomas); silver .38-caliber automatic weapon used (corroborated by Respondent, Chandra Morgan, shell casing and bullet found at the scene); Scott raped a girl (corroborated by Respondent); Scott shot one girl in the back of the head with the .22 (corroborated by Respondent, body of Amy Ayers); position in which Amy Ayers died (corroborated by position of Amy Ayers' body found at crime scene); five shots fired (corroborated by Respondent, bullets recovered from bodies); left the yogurt shop and threw up on the bridge (corroborated by Respondent).

Petitioner's evidence in this case was compelling even without Scott's confession. Presiding Judge Keller provided a succinct summary of Petitioner's evidence in her dissenting opinion:

> In summary, appellant confessed. That confession was voluntary. Appellant had no motive to confess falsely, and there was absolutely no reason for the jury to doubt the truthfulness of the confession. Appellant knew that a .380 semi-automatic handgun was used in the murders, and this information was a closely guarded secret known only to law enforcement and the perpetrators. His various explanations for how he knew that a .380 was used were inconsistent and unbelievable, and he even contradicted himself on the question of whether he had ever owned guns at all. Appellant had previously been seen in possession of a .380 semi-automatic handgun, and on the very day of the murders he was seen in

> possession of a semi-automatic handgun. Appellant's alibi testimony was unsupported by other testimony or physical evidence of any kind. It was contradicted by his own videotaped confession, by Chandra Morgan's testimony, and by Scott's admission to the murders. Not only are Morgan's testimony and Scott's confession inconsistent with appellant's alibi, they are consistent with details of appellant's videotaped confession. The two "alternate suspects" who confessed to involvement in the crime—Briones and Smith—were unaware that a .380 handgun was used, and they implicated "accomplices" who clearly were not involved. Any error in admitting Scott's written confession was harmless beyond a reasonable doubt.

Springsteen, slip op. at *64-*65 (Keller, P.J., dissenting, at App. I).

While not in the above excerpt, Respondent admitted in his videotaped statement that he shot one of the girls in the back of the head with a .380 handgun as she was crawling away, and illustrated with his arms and body the position in which she was later found.

Finally, as noted above, although Respondent did not cross-examine Michael Scott, he was allowed to cross-examine the detectives involved in Scott's interrogation and other witnesses, concerning the defense claims that Scott's statement was coerced and unreliable.

CONCLUSION

The present case differs from other *Crawford* cases because here it is clear from the appellate record what Respondent's "crucible of cross-examination" would have revealed. Respondent's attorneys were able to thoroughly pursue the defense claims about Scott's interrogation and police investigation methods. It is clear that Petitioner would have successfully countered any attempt by Scott at retraction. Petitioner submits that it is simply not possible to listen to the

twenty hours of recorded conversations and read Scott's full written confession without concluding that Michael Scott's admissions were truthful. And Scott would have had to explain why he implicated Respondent. True, such statements might have come in as impeachment. Nevertheless, the net effect of full examination of Scott would have been to destroy his credibility as a witness who could help the defense.

Analysis of the second prong factors, taking into consideration the record's clear showing of what cross-examination of Scott would have produced, shows that Scott's redacted statement to police was not critical to Petitioner's case. It did not establish any of the elements of the offense and was cumulative of and corroborated by other evidence, including Scott's admissions to Statham. Moreover, the other evidence in the trial, including Respondent's own compelling confession and Respondent's knowledge of facts known only to himself and the police, indicate that the admission of the redacted statement without cross-examination did not prejudice the result of this trial.

Petitioner asks that the Court reverse the decision of the Texas Court of Criminal Appeals, and hold that Michael Scott's solely self-incriminating statements were not testimonial within the meaning of *Crawford v. Washington* and progeny. Alternatively, Petitioner asks that the Court remand the case to the court below so that it may conduct a thorough harm analysis, giving full consideration to *Van Arsdall's* requirement that the reviewing court first assume that the damaging potential of cross-examination had been fully realized.

Respectfully submitted,

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APPENDIX A

COURT OF CRIMINAL APPEALS OF TEXAS

AP-74,223

ROBERT BURNS SPRINGSTEEN, IV,
Appellant,

v.

THE STATE OF TEXAS.

May 24, 2006, Delivered

OPINION

The district court convicted the appellant of capital murder and sentenced him to death. A statute requires appeal to this court.[1]

The appellant questions the sufficiency of the evidence of his guilt; in Part I of this opinion, we hold that the evidence of guilt was legally sufficient. In Part II, we consider the appellant's complaints about the admission of hearsay evidence. In light of a significant decision about the constitutional standards for such evidence, which the Supreme Court of the United States delivered after the trial, we hold that the judgment must be reversed. In Part III, we consider some other issues that might recur in a retrial.

I.

Sufficiency of the Evidence

The appellant complains that the evidence was insufficient, both as a matter of law and as a matter of fact, to prove his

[1] *See* Code Crim. Proc. art. 37.071, § 2(h).

guilt beyond a reasonable doubt. He does not contest the sufficiency of the evidence to prove that, on or about December 6, 1991, Amy Ayers was intentionally killed with a firearm in the course of burglary and robbery. His arguments are that "there is no physical evidence supporting the State's theory that appellant and [three other suspects] committed these crimes," there is "DNA and fingerprint evidence suggesting other perpetrators," and his and another suspect's confessions "are facially inconsistent with the crime scene and each other."[2]

A. Legal sufficiency

If the evidence in a criminal prosecution was not sufficient, as a matter of law, to prove a defendant's guilt, the *Double Jeopardy and Due Process Clauses of the United States Constitution* do not permit the courts of a state to retry a criminal case after the reversal of a conviction on appeal.[3] Therefore, even when it has found reversible error in the trial, an appellate court must consider a complaint that the evidence was legally insufficient.[4]

In deciding whether evidence was legally sufficient to sustain a conviction, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[5]

The essential elements in this case are set out in the charge of the court, which required the jury to decide whether the

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[2] Brief, at 77.

[3] *Greene v. Massey*, 437 U.S. 19, 24, 98 S. Ct. 2151, 57 L. Ed. 2d 15 (1977).

[4] *Rains v. State*, 604 S. W.2d 118, 120 (Tex. Cr. App. 1980).

[5] *Griffin v. State*, 614 S. W.2d 155, 159 (Tex. Cr. App. 1981) (conforming this court's minimum standard to the minimum standard of due process).

evidence proved beyond a reasonable doubt that, on or about December 6, 1991, the appellant intentionally caused the death of Amy Ayers by shooting her with a firearm or strangling her with a ligature, while in the course of committing or attempting to commit robbery or burglary. We find sufficient evidence in the appellant's confession and the physical evidence.

Firefighters found the bodies of four teenaged girls while they were extinguishing a fire in the back room of a frozen-yogurt shop in Austin around midnight on December 6, 1991.

Three bodies had been piled together in the center of the room, covered with inflammable materials, and set afire. Each of these three girls had been killed by one shot from a gun that was in contact with the back of her head. A bullet was recovered from the head of each of these bodies. One bullet was a .22-caliber, and the other two bullets were too deformed for their calibers to be determined.

Amy Ayers's body lay apart from the other three. She had been shot twice. One wound was made by a .22-caliber bullet that was recovered from the top of her head. This shot hit the top of the skull and knocked a small plug of bone down on top of the brain. The bullet stopped there, without going into the brain. In all probability, it did not cause her death. Another shot entered her head behind her left ear and went through the brain. This wound was instantaneously fatal. The bullet exited Ayers's right cheek. It was the only exit wound on any of the four girls.

The only bullet that was found at the scene was a .380-caliber bullet near Ayers's body. The only shell casing that was found was a .380-caliber in a floor drain. (A water-pipe had been broken or melted in the room where the bodies were found, and water stood more than an inch deep on the floor.) Investigators closely guarded the fact that a .380-caliber gun had been used, so that that information would not be reported to the public.

The jury heard evidence that a .22-caliber revolver was the only other gun used in the offense.

More than seven years later, the appellant told investigators that he was one of four suspects who took part in the burglary, robbery, and murders at the yogurt shop. His statement was tape-recorded. He said that he had used a .380-caliber, automatic pistol, and that another suspect had used a .22-caliber revolver. He admitted that he used the .380-caliber pistol to shoot a girl behind her left ear. He said that this shot did not kill the girl. He said that he raped the girl after he shot her. His description of the girl's position when he was assaulting her matched photographs of Ayers's body as investigators found it. The appellant said that, after he raped the girl, the suspect with the .22-caliber revolver shot her in the head. The appellant's description of the offenses matched the physical evidence in other aspects as well.

As to Ayers, the only material discrepancy between the appellant's statement and the physical evidence was that the appellant said that the shot that killed the girl was not from his gun, but rather from the other suspect's .22-caliber revolver. The jury, of course, could have believed the appellant's admission that he fired a .380-caliber bullet, and they could have found that that bullet went through Ayers's head and killed her. They could have disbelieved his statement that the other suspect's .22-caliber bullet killed Ayers, in light of the evidence that such a bullet did not penetrate her brain.

Although we shall refer to more evidence in deciding the appellant's other claims, we need not go further into the details here to hold that, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

B. Factual sufficiency

The question of the factual sufficiency of evidence of guilt is resolved by somewhat different standards,[6] and the appellate remedy is very different. If we sustained the appellant's complaint that the evidence was insufficient as a matter of fact, our judgment would be to remand the case to the trial court for retrial.[7] Since we shall render a judgment of remand because of error in the admission of evidence, we need not address the complaint that the evidence was factually insufficient.

II.

Admission of Co-defendant's Statement

In his first and second points of error, the appellant complains that the trial court erred in admitting excerpts from Michael Scott's written confession. The points, which correspond with the appellant's objections at trial, are based respectively on the *Confrontation Clause of the Sixth Amendment to the United States Constitution* and the rules of evidence for hearsay.

A. Rules of Evidence for Hearsay

A rule of evidence makes hearsay inadmissible "except as provided by statute or these rules" or certain other rules.[8]

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[6] *See Jones v. State*, 944 S. W.2d 642, 647-48 (Tex. Cr. App. 1996) (The factual sufficiency review process begins with the assumption that the evidence is legally sufficient. The court views, without the prism of "in the light most favorable to the prosecution," all of the evidence in the record related to appellants sufficiency challenge, not just the evidence which supports the verdict. The court reviews the evidence weighed by the jury which tends to prove the existence of the elemental fact in dispute, and compares it to the evidence which tends to disprove that fact. It sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust).

[7] *See Vodochodsky v. State*, 158 S.W.3d 502 (Tex. Cr. App. 2005).

[8] R. Evid. 801(d).

Another rule of evidence says that twenty-four kinds of hearsay statements are not excluded by the hearsay rule.[9] The twenty-fourth kind, which this case involves, is the statement against interest:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in declarant's position would not have made the statement unless believing it to be true. In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.[10]

B. Confrontation Clause

The admission of hearsay against a criminal defendant, even if permitted by the law of evidence, also implicates the *Confrontation Clause of the Sixth Amendment.*[11] The clause reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." It applies to criminal prosecutions in the courts of Texas.[12]

For about twenty-five years, the Supreme Court had held that the *Confrontation Clause* did not bar admission of an unavailable witness's statement against a criminal defendant

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[9] R. Evid. 803.

[10] R. Evid. 803(24).

[11] *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); *Guidry v. State*, 9 S. W.3d 133, 149 (Tex. Cr. App. 1999).

[12] *See Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1967).

if the statement bore "adequate indicia of reliability."[13] To meet that test, evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness."[14]

In 2004 the Supreme Court departed markedly from its previous tests. It said:

> First, the principal evil at which the *Confrontation Clause* was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused. . . . The *Sixth Amendment* must be interpreted with this focus in mind.
>
> . . . Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices . . .

This focus also suggests that not all hearsay implicates the *Sixth Amendment's* core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the *Confrontation Clause* targeted. On the other hand, ex parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

The text of the *Confrontation Clause* reflects this focus. It applies to "witnesses" against the accused—in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history

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[13] *Roberts, supra* note 11, at 66 (quotation marks omitted).

[14] *Ibid.*

underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist . . . Regardless of the precise articulation, some statements qualify under any definition—for example, ex parte testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.[15]

The Court reversed a state court's judgment of conviction for assault which rested in part on a hearsay statement that the defendant's wife, who did not testify because of a privilege, had given to police investigators.[16]

C. Michael Scott's Written Statement

1. Admissibility

In September 1999, Michael Scott met six times with police detectives and a Texas Ranger who were investigating the murders. The meetings included interviews at the detectives' office, an interview at Scott's home, interviews in automobiles, and trips to the scene of the crime and to places where Scott thought the detectives might find evidence. Scott made more than one tape-recorded statement in which he admitted taking part in the burglary, robbery, and murders at the frozen-yogurt shop. He also signed a written statement.

The statement may well have been admissible under the exception in *Rule of Evidence 803(24)* for hearsay statements that subject a person to criminal liability and the trustworthiness of which are clearly indicated by corroborating circumstances. That issue is moot because it is clear that, under the

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[15] *Crawford v. Washington*, 541 U.S. 36, 50-52, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (citations omitted).

[16] *See id.*, at 65-69.

analysis for the *Confrontation Clause* that the Supreme Court was to adopt in 2004, the trial court's ruling in 2001 was erroneous. Scott's statement was exactly the kind of testimonial statement that the Court held to be prohibited by the Clause: "Statements taken by police officers in the course of interrogations."[17]

2. Harm

The remaining question is the harmfulness of the error. If the appellate record in a criminal case reveals constitutional error that is subject to harmless-error review, the appellate court must reverse a judgment of conviction unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.[18] *Confrontation Clause* violation is subjected to such a review.[19]

Of such determinations, the Supreme Court has said, in words that are as applicable to this case as they were to the one in which the Court wrote them, "Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the [co-defendants' statements that were admitted in violation of the Confrontation Clause] on the minds of an average jury."[20]

We have set out in Part I, above, some facts of the offense. Next we consider the erroneously admitted statement itself. The trial court "redacted" Scott's written statement in an effort to remove its references to the appellant and the other

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[17] *Id.*, at 52.

[18] R. App. P. 44.2(a) (adopting the standard of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

[19] *Lilly v. Virginia*, 527 U.S. 116, 140, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999); *Delaware v. Van Arsdall*, 475 U.S. 673, 686, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

[20] *Harrington v. California*, 395 U.S. 250, 254, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969) (applying the standard of *Chapman*).

suspects. The court admitted the edited statement, which was read to the jury in this form:

> Voluntary statement. At 10:39 o'clock a.m. on the 14th day of September, 1999, and before making the following statement, I, Michael James Scott, while at the Austin Police Department, was warned by Detective Manuel Fuentes, to whom this statement is given, of my rights as follows. [Warnings and waiver omitted.]

My name is Michael James Scott. I am 25 years old. I was born on 2-6 of 1974. I am currently at the Austin Police Department homicide office at the Twin [*16] Towers giving this statement to Detective Manuel Fuentes and Texas Ranger Sal Abreo.

I am giving this statement about my involvement in the death of four girls at the yogurt shop on December 6, 1991.

I had previously given accounts of what happened in 1991 and afterwards to Detective Fuentes, Detective Ranger Sal Abreo, Detective Merrill, Detective Ron Lara and other detectives. Today I told Detective Fuentes and Texas Ranger Sal Abreo that now that I have confessed to my father and my best friend, Patrick Davidson, in my part in the the [sic] girls' death. I have been able to remember and want this statement to be correct and truthful. These things I will clear up in this statement, such as what I threw off the bridge after the murders. I had previously said that I threw a set of keys off the bridge; it was actually a cutting knife that I got from inside the yogurt shop.

And when I told you that I didn't really remember what happened to the second gun, the small semiautomatic pistol, I do remember that I gave it to my friend Patrick Davidson in December 1992 so that he could get rid of it. I did not want to pull him into this, and that is why I have been so hesitant to tell you what happened to the gun. If something happens to

him, he has nothing to fall back on. I will explain this more in detail later.

On December 6, 1991, I don't remember exactly what time it was. It was still daylight. Drove up to the strip mall where the I Can't Believe It's Yogurt shop was at. Go inside and took a look at the yogurt shop. Got up and made it look like going to the restroom. Walked out the back and walked around to the front of the building. Drove back to the mall. Left Northcross Mall. Drove through the alley behind the stores to see if the back double doors were slightly open. The building was on the driver's side, the left side of the car.

I brought the can of Zippo lighter fluid. It was the bigger metal can. Went into the back door. One of the girls said something like, "Hey, you, what are you doing? You don't belong in here." This girl was wearing a T-shirt. I believe that it had the name I Can't Believe It's Yogurt on it. Believe that she was working in the back room.

Expected to find only two girls inside store, and there were two other girls up front in the dining room area sitting down. I could see the commotion going on up front. I checked the door, and it was locked. There was one key in the lock. The door was locked. I looked outside to make sure no one was looking in.

As this went along, I got more and more scared. I looked out to check the front again. I heard the girls crying and one of the girls say that that's all there is. It's been dropped and you can't get to it. I went back there. I saw that all four girls were naked. I went to the pile of clothes and picked up some clothes to use to tie them up.

I remember a T-shirt and a bra used to tie them up. The girls were crying and whimpering. They were begging not to kill them. They said that they didn't want to die. I got a paper towel and put it inside one of the girl's mouth. [*Sic.*] I remember that my finger pushed through the towel when I

was trying to stuff it in her mouth. This may not have worked, so I might have had to use something else to stuff in her mouth. It was like terry cloth.

The girls were on their knees. I don't believe they were standing up, because I was looking down at them. I went to the back and saw one of the dark-haired girls on her hands and knees. I got on top of her. I tried to do her from the front. I looked at her face. I didn't want to look at her face. She had a piece of white terry cloth towel on her mouth. I looked away because I didn't want to see her. I couldn't get it up because I knew that what I was doing was wrong. I sort of faked it. The girl was sitting on the floor. I pointed the gun at her and tried to shoot at first but couldn't. I pointed the gun again at the girl and fired once into her head.

I don't remember seeing a safe, but I don't remember what she was doing down on the floor. I remember looking in the doorway, and the gun is still in my hand. I saw the side profile of the girl. She had like a white shirt on. I think I shot her in the head. I have been not wanting to remember this. I know I told you something different, but I did her too. I dropped the revolver.

I saw the girls laying [*sic*] there and I pulled one of the girls on top of the other. I gathered up napkins, cups, paper towels, and piled them on top of the three girls. I sprayed Zippo fluid on top of the girls. I emptied the can of lighter fluid. I had a Zippo lighter with me and lit the fire. I heard a whoosh sound of the accelerant when it caught fire. I don't remember what I did with the can. I could have threw [*sic*] it in the pile of stuff in the back of the store.

I remember that my only thought was to get out. I went outside. I had taken a knife from inside the shop. I believe I got it off the counter. It was a nice knife. I told you all before that I had taken a set of keys, but it was a knife. I remember now that it was a knife.

I remember driving but I don't remember what direction.

I got out and threw up over the railing of the bridge. I took the knife and I threw it over the rail also. I made sure it was gone. I remember trees, and I don't remember seeing any water. I got back into the car. I don't know what happened next. I remember being back at the apartment.

Detective Fuentes asked me to describe the two guns. A black .22-caliber revolver, small; I think it had wood grips. A small, semiautomatic pistol; it had a clip. I think it was a .38. Some of the writing on the gun was scratched off.

On the weekend I rode to San Antonio. I got a hold of a newspaper and I remember reading about the fire and the yogurt shop murders. I read it out loud. I remember getting back home and wanting to do nothing more than sleep.

The semiautomatic was lying on the bed. I knew that I had to get rid of it. I picked it up and left the apartment. I remember walking past a dumpster and thinking I should just throw it in the dumpster. I walked into the creek in the apartment complex. I put it in a hole in the side of a wall in the creek. I wedged another rock in it. I stacked some rocks near it as a marker to remind me where it put it. [*Sic.*]

In December of 1992 I was smoking a lot of pot. I had been drinking a lot too and started having flashbacks. I went back out to the creek and found the gun. I took the gun and put it in a brown paper back (*sic*) that I found in the creek. I took the gun back to south Austin to our apartment. I told Pat that I needed to get rid of what was in the sack. I didn't tell him. He told me that he put it out in the trash.

I can read, write and understand the English language in the above statement I have read, and it is true and correct to the best of my knowledge and belief. Signed, Michael J. Scott.

In determining the probable impact of this erroneously admitted statement on the minds of an average jury, we also must consider the importance of the witness's testimony, whether the testimony was cumulative, the presence or absence of corroboration, and the overall strength of the State's case.[21]

There was no physical or forensic evidence connecting the appellant to the crime. There was no witness that could tie the appellant to the crime. The question of the appellant's guilt hinged on whether the jury believed the appellant's videotaped confession, which the jurors saw and heard.

The appellant repudiated the confession. He testified that on the night of the murders, he went to a movie and met Scott afterward. He said that he confessed because he gave up on himself and thought that if he told the police what they wanted to hear, they still could not do anything to him because he was not involved in the murders.

In this case, a repudiation of a confession may have more than the usual weight. Police investigators had obtained other confessions to these murders that included non-public information, and the investigators had decided the confessions were not true. Within days of the murders, police were inundated with tips and leads. Many people knew facts that a witness called "the kind of information that should have remained at the crime scene." The appellant introduced several stories that the local newspaper published in December 1991 that contained "non-public" facts about the crime. An investigator testified that within weeks of the murders, "too many people [knew] too much about [the] crime scene." Many teenagers frequented the mall area near the yogurt shop, and information that the police had withheld quickly spread among "kids talking to each other about what they thought they knew about the case." Another investigator

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[21] *Van Arsdall, supra* note 19, 475 U.S., at 684.

testified that "perhaps as many as 60 teenagers in that first week or two after these murders were brought in for questioning." He and another investigator testified that the investigation was derailed when too many teenagers began providing too much confidential information. The investigators had to investigate the leakage of information from their own investigation. Several investigators were removed from the case, one after being investigated by the internal affairs division.

In February and March 2002, Alex Briones and Shawn Pearson Smith confessed to the murders. The appellant introduced these confessions, which contained non-public, "hold-back" facts. Despite the confessions, police investigators decided that neither Briones or Smith had committed the crime.

The State argued that, despite the appellant's repudiation of his statement about shooting Ayers, several details of his confession matched details Scott provided and therefore, Scott's statement corroborated the appellant's confession. The introduction of Scott's edited statement was therefore vital to the State's case; it was used to attack the veracity of the appellant's recantation and to inferentially connect the appellant to the crime. The State reminded the jury of the importance of Scott's statement in its closing argument when it referred to Scott's excerpts and its corroborating details a number of times.

Scott's statement also corroborated the State's explanation of the physical evidence. Although it was undisputed that there had been a fire at the scene of the crime, it was not clear whether an accelerant had been used to start the fire. Experts disagreed. The State's position in this trial was that an accelerant had been used, and it was supported by Scott's statement.

We cannot say, beyond a reasonable doubt, that the admission of Scott's statements did not affect the jury's determination of the appellant's guilt. We sustain the appellant's first point of error.

III. Other Issues

A. Admission of Co-defendant's Statement to Statham

The appellant's third and fourth points of error are that the trial court erred in admitting Amanda Statham's testimony that Scott admitted to her that he committed the offense. The appellant complains, as he did in his first two points, that the evidence was hearsay and that it violated his right to confront the witnesses against him.

Statham testified that several days after the murders she was talking with Scott at her house. She asked him why the police had questioned him about the murders, and he said, "I did it." Scott also told her some details of the murders.

Scott's statement was clearly a statement against his penal interest, which comes within an exception to the hearsay rule.[22] In addition, it was a spontaneous statement made to a friend during a casual conversation shortly after the commission of the crime, and it was said in a non-threatening, non-coercive atmosphere. Finally, Scott's later written statement, the appellant's statement, and the physical evidence independently corroborate Scott's confession of guilt to Statham.

The appellant argues that, because Statham testified that she was drinking vodka when Scott made his statement and that she did not believe him, the statement should not have been admitted. Statham's drinking might affect a jury's view of her credibility, and her opinion of the truth of Scott's statement (on the admissibility of which we express no opin-

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[22] *See* R. Evid. 803(24).

ion) might go a jury's decision on that issue, but they would not mean that the trial court abused its discretion in admitting the evidence.

With regard to the appellant's claim that the admission of the statement violated the Confrontation Clause, we conclude that the statement was nontestimonial under *Crawford.* In explaining the meaning of "testimonial statement," the Court in *Crawford* said, "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[23] Scott's statement to Statham was such a remark. We hold that the admission of the statement did not violate the *Confrontation Clause.* Points of error three and four are overruled.

B. Admission ofStatham's Statement to Her Mother

In his fifth and sixth points of error, the appellant asserts, "Because Stratham's testimony was inadmissible, third-party rehabilitation testimony [from Statham's mother] is likewise inadmissible."[24] Since we have overruled the appellant's points that Statham's testimony was inadmissible, we shall not sustain this argument which depends on those points. Points of error five and six are overruled.

C. Voluntariness of the Appellant's Statements

In his seventh and eighth points of error, the appellant complains that the trial court erred in admitting his statements to the police in violation of the *Due Process Clause of the United States Constitution* and the Due Course of Law provision of the Texas Constitution because his statements were involuntary.

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[23] 541 U.S., at 51.

[24] Brief, at 59.

On September 15, 1999, Austin Police Detective Robert Merrill and a local officer, who were dressed in plain clothes, drove an unmarked police car to the appellant's residence in Charleston, West Virginia. When the appellant answered the door, both officers identified themselves. Merrill told the appellant that he was following up on the investigation of the yogurt-shop murders and that he would like to speak with the appellant about the murders. The appellant agreed, called his wife, and voluntarily accompanied the officers to a local police station.

Throughout the day, Merrill told the appellant more than once that he was not under arrest and that he could return home at any time.

At the station, the appellant waited in the lobby for a few minutes while Merrill checked the interview room. Earlier in the day he had set up a video camera that was built into a wall clock and put a small audio recorder in the drawer of a desk in the room. Merrill then showed the appellant to the interview room and began the interview around 2:15 p.m.

Around 7:00 or 7:30 p.m., Merrill and the appellant agreed to put the appellant's statement in writing. Merrill then read the appellant the *Miranda*[25] warnings that were on a statement form. The appellant terminated the interview, saying that he wanted to go home and talk to his wife about everything before continuing. Merrill asked him if he also was invoking his right to an attorney, and the appellant said that he was. Merrill immediately stopped the interview, and officers took the appellant home.

Merrill testified that, although the subject of a lawyer came up several times during the interview, the appellant did not invoke his right to an attorney until the very end, of the

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[25] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966).

interview at which time Merrill immediately terminated the interview. Merrill also informed the appellant several times throughout the interview that he was not under arrest and that he was going home after the interview. Indeed, weeks passed between the interview and the appellant's arrest.

Because the appellant has not argued that the Texas Constitution should be interpreted differently from its federal counterpart, we shall treat them as providing the same protection and address the points together.[26]

The *Due Process Clause of the Fourteenth Amendment* requires that a confession must have been voluntarily made to be admissible.[27] Coercive police activity is a necessary predicate to the finding that a confession is not "voluntary."[28] In other words, a court must examine whether the defendant's will was overborne by the circumstances surrounding the giving of the confession; the court must take into consideration the totality of all the surrounding circumstances, including both the characteristics of the accused and the details of the interrogation; the determination requires a weighing of the circumstances of pressure against the power of resistance of the person confessing.[29] The *Fifth Amendment* requirements of *Miranda* apply only if the statement at issue was the result of the interrogation of a suspect who was in custody at the time.[30]

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[26] *See Heitman v. State*, 815 S. W.2d 681, 690-91 n.23 (Tex. Cr. App. 1991).

[27] *See Brown v. Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936) (reversing a criminal conviction under the *Due Process Clause* because it was based on a confession obtained by physical coercion).

[28] *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

[29] *Dickerson v. United States*, 530 U.S. 428, 434, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

[30] *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The appellant argues that his police-initiated statement was not voluntary because (1) he was interrogated for several hours, (2) his attorney was not allowed access to him, (3) he was a high school dropout with a learning disability, (4) he was not advised of his *Miranda* rights, (5) he was interviewed in a police interrogation room with a hidden video camera, and (6) the police lied to him by suggesting that they had evidence that, in fact, did not exist.

The appellant was approached at his home by the police. At their request, he voluntarily accompanied them to the police station to discuss the murders. The uncontroverted evidence shows that the authorities never arrested the appellant or otherwise held him in custody during the time that he was at the station. In fact, the evidence shows that he could have left the building at any time. Because the appellant was never in custody, the police were not required to read him his *Miranda* rights. Further, no evidence was presented indicating that the police somehow tried to exploit the appellant's alleged learning disability to gain the statement.[31]

Although the interview was long, the appellant indicated that he had participated in lengthy sessions before, and the evidence showed that he was told on a number of occasions that he was not under arrest and that he could leave at any time. That his attorney was not allowed to see the appellant is also of no consequence in this determination. The appellant's father-in-law testified that he hired an attorney to represent the appellant after the appellant had accompanied the police to the station and had been talking to them for some time. Even if the protections of *Miranda* are triggered, the police have no duty under the *Fifth Amendment* to inform a suspect of an attorney's efforts to reach him.[32] The *Sixth Amendment*

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[31] *See Connelly*, 479 U.S., at 164-65.

[32] *Moran v. Burbine*, 475 U.S. 412, 425, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986).

right to counsel had not attached because the appellant had not been charged.[33]

Finally, the appellant implies that the use of hidden recording devices and false information about the evidence against him amounted to police coercion and undermined the voluntariness of the statement. Deception is only one factor to be considered in applying the general "totality of the circumstances" test.[34] Deception concerning what incriminating evidence authorities may have is not the type or character of coercion that would overbear the will of the defendant and bring about a confession not freely determined.[35] Finally, the appellant cites no law requiring officers to inform a suspect that their conversation with him is being recorded.

Given these circumstances, the appellant has failed to show that his statement was the product of any police coercion or that it was involuntary. Points of error seven and eight are overruled.

D. Admission of Other Testimony

In his ninth point of error, the appellant complains that the trial court erred in allowing James Ramsbottom to testify that he had seen the appellant in possession of a gun four to five years before the murders. He contends that this testimony was irrelevant, more prejudicial than probative, and amounted to improper extraneous-offense or character evidence.

During a hearing outside the presence of the jury, the appellant objected several times that Ramsbottom's testimony was about an act that was too remote to be relevant. The appellant also argued, "Any probative value [the testimony]

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[33] *See id.*, at 430-31.

[34] *See Frazier v. Cupp*, 394 U.S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969).

[35] *Green v. State*, 934 S. W.2d 92, 99-100 (Tex. Cr. App. 1996).

might have is clearly outweighed by the prejudicial impact" of the evidence. In response, the State argued that the testimony was highly relevant and probative because it placed the appellant in possession of a "silver .380." The State noted that the ballistics evidence showed that Amy was killed with a .380-caliber weapon, and the appellant in his own confession stated that he used a "silver .380" in the commission of the instant offense. The appellant then briefly commented that he thought the testimony tended "to go more as a character trait," and the parties continued to argue the relevance of the evidence.

Outside the jury's presence, Ramsbottom testified that he knew the appellant in junior high school in West Virginia in 1986 and 1987. Ramsbottom told the court that on numerous occasions he saw the appellant in possession of a chrome- or nickel-plated .380 semiautomatic handgun with black grips. He also testified that the weapon was taken away from the appellant by another student during an altercation. After a review of a "substantial portion of the testimony in the case" and relevant case law, the judge ruled that the testimony would be allowed, without any reference to the place or the circumstances in which the witness saw the appellant with the gun, or to any other weapons that he may have seen. The judge noted that such details were more relevant to the immaterial fact of character than to the material fact that the appellant was seen in possession of a particularly described weapon that he was claiming never to have possessed. The judge further cautioned the State that its closing argument should be restricted likewise.

In his argument on appeal, the appellant again asserts that the testimony involves information that is too remote to be relevant, and that any probative value it may have was outweighed by the danger of unfair prejudice.

Under *Rule of Evidence 401*, evidence is relevant if it makes the existence of a fact that is of consequence to the

determination of the action more probable than it would be without the evidence. *Rule 402* makes all relevant evidence admissible unless a law provides otherwise. However, even when relevant, evidence may still be excluded by the trial court.

One such law is *Rule 403*, which authorizes exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice (among other things). The admissibility of evidence is within the discretion of the trial court, and the court's decision will not be overturned if it was not an abuse of discretion. In other words, as long as the trial court's ruling was within the zone of reasonable disagreement, the appellate court should affirm.[36]

The State argued that the testimony at issue was relevant evidence of the appellant's possession of a weapon that was like the one that killed the victim, and that he confessed to using in killing the victim (although he recanted the confession). The judge could have concluded reasonably that the danger of unfair prejudice from the limited testimony about the gun did not substantially outweigh the probative value.

With regard to *Rule 404*, even assuming that defense counsel's mention of "character" at trial preserved this issue for review, the appellant's argument on appeal does no more than cite the language of the rule. Because he has failed to apply the extraneous-offense and character-propensity law to the facts in this case, he has failed to brief this portion of his point adequately, and we shall not address it.[37]

The court did not abuse its discretion in allowing the testimony. Point of error nine is overruled.

The appellant complains in his tenth and eleventh points of error that the trial court erred in allowing the testimony of

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[36] *Montgomery v. State*, 810 S. W.2d 372, 391 (Tex. Cr. App. 1991).

[37] *See* R. App. P. 38.1(h).

psychologist Dr. Jeffrey Harlow about his therapy sessions with the appellant. He contends that this testimony was irrelevant and prejudicial and violated his "confidential communications privilege." The appellant again cites *Rules of Evidence 401, 402, 403*, and *404*. However, his argument on the application of *Rules 401 through 403* consists of the conclusory statements, "This testimony is irrelevant, and any probative value is grossly outweighed by its prejudicial nature," and, "For the sake of brevity, appellant refers this Court to his arguments and authorities in Point of Error IX, *supra*." The appellant makes no argument or other reference to *Rule 404*. Because the appellant has failed to apply the law to the facts involved in these points of error, he has failed to adequately brief these aspects of his points, and we shall not address them.

The appellant's eleventh point of error is that Harlow's testimony violated his "confidential communications privilege." He recognizes that no such privilege exists in Texas for criminal proceedings. Nevertheless he contends that, because the communications occurred in West Virginia, the law of that state should govern.

In *Gonzalez v. State*, 45 S.W.3d 101, 103 (Tex. Cr. App. 2001), this Court recognized the general rule that when there is a conflict of laws concerning the admissibility of evidence, the law of the forum applies. There are three exceptions to this rule: privileged communications, parol evidence, and the statute of frauds. In the case of privileged communications, admissibility depends upon which state had the "most significant relationship" with the communication. The state where the communication took place is generally the state with the most significant relationship.[38]

Assuming that West Virginia law has the most significant relationship with the communication, the appellant still

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[38] *Id.*, at 106.

cannot prevail. When asked whether such a privilege existed in criminal trials in West Virginia, Harlow responded that no privilege existed if there was a court order signed by a judge. Harlow's understanding of the law corresponds with *West Virginia Code Section 27-3-1*, which states in pertinent part:

> Definition of confidential information; disclosure
>
> (a) Communications and information obtained in the course of treatment or evaluation of any client or patient shall be deemed to be "confidential information" and shall include the fact that a person is or has been a client or patient, information transmitted by a patient or client or family thereof for purposes relating to diagnosis or treatment, information transmitted by persons participating in the accomplishment of the objectives of diagnosis or treatment, all diagnoses or opinions formed regarding a client's or patient's physical, mental or emotional condition; any advice, instructions or prescriptions issued in the course of diagnosis or treatment, and any record or characterization of the matters hereinbefore described. It does not include information which does not identify a client or patient, information from which a person acquainted with a client or patient would not recognize such client or patient, and uncoded information from which there is [*42] no possible means to identify a client or patient.
>
> (b) Confidential information may be disclosed:
>
> * * *
>
> (3) Pursuant to an order of any court based upon a finding that said information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality established by this section[.]

The trial judge found that the information sought in the trial was sufficiently relevant to the proceeding to outweigh maintaining the confidentiality of the communications about which the doctor would be questioned. The court then ordered Harlow to answer the parties' questions. Thus, the court complied with West Virginia law and did not err in admitting Harlow's testimony. Points of error ten and eleven are overruled.

The appellant complains in point of error twelve that the trial court erred in admitting the testimony of David Cancelada, M.D., who he claims testified beyond his realm of expertise. Specifically, the appellant complains that Cancelada was allowed to testify that photographs of the crime scene suggested direct-flame contact on the bodies.

Rule of Evidence 702 reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Under *Rule 702*, the trial court, before admitting expert testimony, must be satisfied that three conditions are met: (1) that the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education, (2) that the subject matter of the testimony is an appropriate one for expert testimony, and (3) that admitting the expert testimony will actually assist the factfinder in deciding the case.[39] We review a trial court's decision to admit or exclude expert testimony under an abuse-of-discretion standard. A ruling that is within the zone of reasonable disagreement will be upheld.[40]

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[39] *Alvarado v. State*, 912 S. W.2d 199, 215-16 (Tex. Cr. App. 1995).

[40] *Sexton v. State*, 93 S.W.3d 96, 99 (Tex. Cr. App. 2002).

Outside the jury's presence, the appellant objected that Cancelada was not qualified to offer opinions about whether the burns the victims received were contact or radiation burns. The State established that Cancelada was a general surgeon who had specialized in burns for the last three years. Cancelada testified that he was familiar with the various types of burns and their degrees. He also testified that he had seen over 700 burn patients in his specialized clinical experience. The court ruled that Cancelada was qualified, based on the information Cancelada had received in the case and his training and experience, to testify that the burns depicted in the photographs were consistent with burns that he had seen in his experience that were caused by direct flame, but that he could not testify that the burns depicted in the photographs definitely were one kind of burn or another. Thus, the judge sustained the appellant's objection in part and overruled it in part.

The trial court was within its discretion in admitting the limited portion of Cancelada's testimony, reasonably finding by a preponderance of the evidence that: (1) Cancelada, because of his training and experience, qualified as an expert on burn injuries, (2) burn injuries and any attendant damage is an appropriate area for expert testimony because lay persons are typically not versed in the area, and (3) Cancelada's specialized knowledge would assist the jury in appellant's case. The appellant's point of error twelve is overruled.

E. Constitutionality of Code of Criminal Procedure Article 37.071

In his fourteenth and fifteenth points of error, the appellant asserts that *Article 37.071* is unconstitutional as applied to him because it allows for the execution of a juvenile offender in violation of the Eighth Amendment to the *United States Constitution* and international law.

The appellant has failed to preserve these issues for our review because he did not raise them at trial. Therefore we may not consider them on appeal.[41] We have no doubt that on remand the district court will act in accordance with the decision that the Supreme Court made, after the trial of this case: "The *Eighth* and *Fourteenth Amendments* forbid the imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."[42]

Conclusion

The judgment of the District Court is reversed, and the case is remanded to that court.

Delivered May 24, 2006

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[41] *See* R. App. P. 33.1(a): ("As a prerequisite to presenting a complaint for appellate review, the record must show that (1) the complaint was made to the trial court . . .").

[42] *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

DISSENT:

Keller, P.J., *filed a dissenting opinion in which* Hervey *and* Keasler, JJ. *joined.*

The Court reverses appellant's conviction because of the admission into evidence of Michael Scott's written statement. I believe that a comprehensive examination of the testimony reveals that, beyond a reasonable doubt, the admission of Scott's written statement did not contribute to the jury's conclusion that appellant murdered Amy Ayers. With respect, I dissent.

Setting aside Scott's statement, the jury had for its consideration appellant's confession that he committed the crime with Scott, Maurice Pierce, and Forrest Welborn. By itself, a confession is a powerful piece of incriminating evidence. I start with the fact that in order to acquit appellant, the jury would have to disbelieve, or at least have a reasonable doubt about believing, appellant's own videotaped confession. The Court contends that appellant's repudiation of the confession at trial "may have more than the usual weight" because many so-called "nonpublic facts" were widely known and because two other people falsely confessed to the crime. I disagree.

It is first noteworthy that the September 14, 1999, interview in which appellant's confession was obtained was electronically recorded on videotape and by audio recording. As a result, the jury was not confronted with varying stories concerning what actually happened during the interview. Instead, the jurors could be confident that the State was correctly presenting what transpired, since the interview itself was available for review. Appellant was, incidentally, unaware that the interview was being taped.

An examination of that interview reveals that, while officers were firm in pressing for the truth and for details, no coercion was used, appellant was not threatened in any manner, and no promises were made. Although the officers

often expressed their disbelief regarding appellant's initially exculpatory answers and they misled appellant by overstating the strength of the evidence against him (e.g. whether the co-conspirators had implicated him and whether the movie appellant said he went to see was actually playing that night), these tactics played upon appellant's guilty mind and were not the kind of tactics that would an inspire an innocent person to confess falsely.[1]

The fact is, the defense offered no remotely believable motive for appellant to confess falsely to involvement in the murders. Appellant claimed that he did so because he "just kind of gave up on [him]self" and believed that the "physical proof" would exonerate him anyway. I can see how "giving up" might conceivably contribute to a decision to confess induced by, say, threats. But I do not understand the logic of "giving up" being a stand-alone reason to confess. Regardless, if appellant truly believed the physical evidence would exonerate him, there was no reason to confess. He could have simply walked out.[2] At trial, appellant claimed that he felt that he was not free to leave because he requested a lawyer near the beginning of the interview and that request was "totally ignored," but the recorded interview shows otherwise.

When the interview began to become accusatorial, appellant said, "If I'm being accused of something, then I would

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[1] "Of the numerous types of police deception, a misrepresentation relating to an accused's connection to the crime is the least likely to render a confession involuntary. The police conduct complained of here, concerning the strength of the prosecution's case against appellant, falls into this category." *Green v. State*, 934 S. W.2d 92, 100 (Tex. Crim. App. 1996) (citation omitted), *cert. denied*, 520 U.S. 1200, 117 S. Ct. 1561, 137 L. Ed. 2d 707 (1997).

[2] *See Dowthitt v. State*, 931 S. W.2d 244, 255 (Tex. Crim. App. 1996), *cert. denied*, 526 U.S. 1070, 119 S. Ct. 1466, 143 L. Ed. 2d 550 (1999) ("Stationhouse questioning does not, in and of itself, constitute custody.").

like a lawyer present," and he stated that he had been questioned over and over, and "would like this to come to an end . . . one way or the other." One of the officers responded that they would also like the matter to come to an end and asked, "Are you telling us that you want a lawyer and you want to leave?" Appellant then asked if there were any charges against him, and the officer informed him that he was not under arrest and was free to leave any time he wanted to. Appellant responded that he wanted "to do this the right proper way" but did not ask to leave or request an attorney, and the questioning continued. So, contrary to appellant's trial testimony, his inquiry about an attorney was not "totally ignored." In fact, later in the interview, appellant volunteered that the officers "seem like real nice knock out guys and have been real friendly and kind" - hardly a description of officers running roughshod over his rights. And the officers did nothing to contradict their statement that appellant was free to go. There is no indication that they deprived him of food or denied him breaks, nor is there any indication that he was denied the ability to contact friends or relatives, or even an attorney, if he so desired.[3]

But even if appellant really believed that he was not free to leave, the issue of harm hangs on whether the jury would have believed the unlikely claim that appellant would implicate himself in a capital murder for the purpose of shortening a temporary period of detention. There was simply no reason for the jury to conclude that the confession was anything other than a voluntary and truthful statement.

The Court suggests that the existence of other, false, confessions (specifically that of Alex Briones and Shawn

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[3] *See id.* at 256-257 (custody occurred as after development of probable cause, where the length of questioning was extraordinary, the defendant was accompanied on restroom breaks, and police ignored repeated requests to see wife).

Smith) somehow makes appellant's confession less believable. In an infamous case such as the "Yogurt Shop Murders," law enforcement may deal with mentally imbalanced individuals who confess simply as a way of thrusting themselves into the limelight. But limelight-seekers tend to inject themselves into a case during the height of publicity, not years later when the trail has grown cold. Briones and Smith[4] gave their inculpatory statements in February and March of 1992, within just a few months of the murders, which occurred in December of 1991. Appellant, by contrast, denied involvement in the crime when he was interviewed in December of 1991, and he continued to deny involvement through much of the interview conducted in 1999. At any rate, appellant never claimed such a motive in his trial testimony.

There are other reasons, from a motive standpoint, to distinguish appellant's confession from that of Briones. Briones had been arrested for a San Antonio murder, in which he had raped a woman and set her on fire. When Austin Police Sergeant Hector Polanco interviewed Briones regarding the yogurt shop case, it was evident that Briones was going to be convicted of the San Antonio murder. Briones expressed his desire to be executed because he did not want to "rot" in prison. Briones was also aware of a $ 100,000 reward for information leading to the capture of the participants in the yogurt shop murders. During the interview, he talked quite a bit about the reward money and asked whether his family would get the reward because they had assisted law enforcement in locating him. Polanco told him that was a decision to be made by Crime Stoppers "but yeah, if it led to the arrest and convictions."

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[4] Smith's statement was not particularly inculpatory. He claimed that he just tagged along with three other individuals to watch one of them scare a girl who caused that person to lose money in a marijuana deal. Smith said that he tied up one of the girls in the yogurt shop but was completely surprised when the other participants stripped the girls naked, engaged in sexual assaults, and murdered the victims.

Moreover, appellant's confession contained a crucial piece of information known only to the perpetrators and to law enforcement: that a silver .380 automatic was one of the murder weapons. The Court makes much of the fact that many nonpublic ("hold-back") facts were actually widely known. But Sergeant Bruce Boardman testified that "there were two or three things that were still held close to the vest, so to speak, that would turn the case if the individual came up with the right answers." Boardman explained that certain detailed information, such as the specific cause of death or the number of gunshot wounds, were more easily kept secret because they were not the type of facts that could be ascertained from a casual observation of the crime scene. It was determined that Amy Ayers was killed by a .380 caliber bullet, which was collected from the scene.[5] A ballistics analysis of the grooves found on that bullet linked it to one of several .380 automatic models, most likely an AMT .380 Backup. The ballistics expert testified that all the guns of that model that he had seen up to the time of the crime were a silver-gray in color, although the color of the handgrips varied. Whether the gun was silver was not considered to be a hold-back fact because the gun would either be silver or black, so someone would have a fifty-fifty chance of choosing the correct color. But testimony from two different police witnesses, Detective Robert Merrill and Sergeant John Jones, confirmed that the identity of the gun as a .380 was a closely guarded fact that was never revealed to anyone outside of law enforcement.

No evidence at trial suggests that this information was ever leaked. And neither Briones nor Smith told police that a .380 was used in the offense. Briones characterized the two weapons used as a black .22 automatic[6] and a chrome .38

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[5] A shell casing for the bullet was retrieved in a later search.

[6] The absence of shell casings for the .22 led the police to believe that it was not an automatic, but a revolver.

automatic. Despite the orthographic similarity between .38 and .380, they are not the same type of gun. Moreover, Briones characterized the .38 as "pretty big" but both Detective Merrill and appellant characterized the .380 automatic as a small gun.[7] Smith described the two weapons as a silver revolver, smaller than a .357, and a black automatic of some sort. He gave no caliber ratings for the guns because he claimed that he was unfamiliar with calibers.

But in his confession, appellant characterized the gun he used as a silver .380 automatic, a piece of information that, in the absence of a really good exculpatory explanation, ties him to the crime. In attempting at trial to explain his remarkable knowledge of this information, appellant gave inconsistent and unbelievable stories. When asked during direct examination what basis he had for telling the police that the gun was a .380, appellant first replied, "I don't know." He then suggested that he thought of a .380 because a former coworker possessed a silver .380 for his own protection. When pressed further by his own attorney, appellant said that Detective Merrill had told him during questioning that a large caliber weapon had been used in addition to the .22, that

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[7] There was testimony that Briones appeared to lack information on many other facts relating to the crime. Sergeant Mike Huckabay testified that he was asked to take over the interview being conducted by Polanco. Polanco objected, but was overruled. When Huckabay began by asking Briones to tell him about the four girls, Briones expressed surprise, because he thought there were only three. After more questioning, it became obvious to Huckabay that Briones "had a lot of the facts wrong." Huckabay then walked outside and told Polanco, "Hector, this guy don't know jack." Polanco replied, "Let me talk to him some more," and went back into the interview room. Later, he came out and told Huckabay that Briones was ready, and at that point Briones gave a written statement. After an internal affairs investigation, Polanco was taken off the case. That investigation elicited statements from Briones that Polanco had threatened him and told him what to say. There is nothing in the record to indicate that Polanco ever interviewed appellant.

appellant considered a large caliber to be a .45, a .40, or a 9 millimeter, and that appellant said the gun was a .380 because he figured that a small caliber such as a .380, a .3 8, or a .25 would not match the facts of crime. Contrary to appellant's claim, however, the recording of the interview reveals that Detective Merrill never made any suggestion regarding the nature of the weapon that killed Amy Ayers. And appellant did not suggest that the gun was a .38 or a .25; he said it was a .380. When pressed on the matter during cross-examination, appellant changed his story, replying that it was "also very possible that during my questioning, either here in Austin or over the phone, that that was brought up previously." Appellant later agreed that his mention of the .380 was a "guess."

Strikingly, appellant did not claim that he guessed ".380" because he had previously owned one. In fact, during his trial testimony, appellant denied that he had ever owned a .380. But James Ramsbottom, a junior high school acquaintance of appellant's in West Virginia, testified that he saw appellant in possession of a nickel-plated or chrome-plated .380 firearm with black handgrips.

Appellant's equivocation regarding the .380 extended also to the question of whether he owned any firearms at all.

In the early part of his 1999 recorded interview, appellant claimed, "I've never owned a gun." Later, in a *gratuitous* explanation for why he was shocked by Pierce's conduct during the incident, appellant stated, "I like guns, I like *collecting* guns, it's—it's not a toy, in my opinion."[8] In the course of a single interrogation, appellant went from never owning a gun to being a gun collector. Although appellant denied at trial that he had ever owned a .380, he conceded that he had owned guns. When asked at trial about the contradiction in the recorded interview, appellant attempted to harmonize his earlier statements by saying, "Family members

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[8] Emphasis added.

in my family collect guns that I have access to, but I do not collect guns myself." Of course, appellant denied that any member of his family had access to a .380.

Both the recorded interview and appellant's trial testimony reveal his attempt to distance himself in any way possible from what he knows is the murder weapon. He has never owned guns, but he collects them. He does not collect guns, but his family collects them and he has access to them. He does not know why he said .380 but maybe it is because a he saw a .380 owned by a co-worker. Or perhaps it is because he knows the .380 is a small caliber and the detective said in the interview that a large caliber was used in the crime, so the .380 could not have been one of the murder weapons. But the detective did not say a large caliber was used in the crime, so perhaps appellant was told in a previous conversation that a .380 was one of the murder weapons. But in any event, appellant never owned a .380, despite the fact that a junior high acquaintance saw him with one. And his family never owned a .380 either. The mounting contradictions make appellant's position more and more implausible. The Court's harm analysis does not account for the probable effect that the contradictions would have had on the jury's determination of whether appellant's confession was true.

In addition, appellant's defense was torpedoed by the State's complete dismantling of his alibi. The murders were believed to have occurred shortly after the shop closed at 11:00 p.m. A police officer looking for drunk drivers noticed smoke coming out of the yogurt shop and reported the fire at 11:47 p.m.

At trial, appellant testified that he was at Northcross Mall during the relevant period of time. Specifically, he claimed that he and Scott arrived at the mall between 10:20 and 10:30 p.m., when Pierce and Welborn went to pick up Pierce's sister from work. He claimed that he remained at the mall and sneaked into the movie theater there at midnight to watch the

Rocky Horror Picture Show. He said that Scott attempted to sneak in also but was apparently caught and waited outside for appellant until the movie was over. He claimed further that Pierce and Welborn were supposed to pick them up when the movie ended around 1:30 or 2:00 a.m., but never showed up. Appellant testified that "an older gentleman" named "Bob or Robert," who had attended the movie, gave him and Scott a ride, dropping them off near Scott's mother's house, where appellant and Scott spent the night.

First, no one confirmed appellant's story at trial. Perhaps it is too much to expect that Scott, Welborn, or Pierce, who were also accused of this crime, would testify on appellant's behalf, but the fact remains that they did not. Thomas Powe (whom appellant characterized early in the recorded interview as his "best friend" while he lived in Austin) also could not confirm appellant's story. Powe had heard earlier in the day that appellant was going to be at the mall, so he looked for him before entering the movie theater but did not see him. (Under cross-examination, Powe conceded it was possible that appellant could have attended the movie without being seen by him.) Appellant also failed to secure the testimony of "Bob," who supposedly gave him and Scott a ride to Scott's mother's house.

Second, appellant's alibi was fully refuted by Chandra Morgan, who, at the time of the murders, was a junior high student who knew Pierce and Welborn. Morgan testified that on the evening of the murders she met Pierce, Welborn, and two other boys, and consumed "acid" with them. In court, she identified appellant as one of the other boys. After consuming acid, they got into a car driven by Pierce and went to the yogurt shop. Welborn stayed outside while the others, including Morgan, entered the shop. While there, Morgan drank some water, and the boys went to the restroom. Afterwards, they returned to the mall, and Morgan went to the arcade. Morgan lost contact with the boys for 30 to 45

minutes, after which they drove up and asked her if she wanted a ride. As they were driving away, she heard fire engine sirens. She told the boys that she wanted to see where the fire engines were going, but they continued to drive away from the area until they reached Gullet Elementary School. Morgan noticed that appellant was carrying a gun in his waistband. The gun appeared to be a semi-automatic.

Morgan's testimony contradicted appellant's alibi by placing him in the company of Pierce and Welborn at the time of the fire when—according to him—he was at the mall getting ready to sneak into a movie. Her testimony also contradicted appellant's story about Pierce and Welborn not showing up after the movie was over, requiring him to hitch a ride with another moviegoer. And, importantly, her testimony showed that appellant had a semi-automatic handgun that night, a fact that is too remarkable to be a coincidence.

Appellant's alibi was also seriously undermined by Scott's admission of guilt. Although Scott's written confession to law enforcement officials may have been inadmissible, the Court has acknowledged that Scott's confession of guilt to Amanda Statham was properly admitted as a statement against interest. The statement to Statham does not contain the amount of detail found in the written confession, but the bare admission of guilt made by Scott is itself inconsistent with appellant's story at trial. While appellant's alibi would separate him from Scott for an hour-and-a-half to two hours during the movie, the murders were not committed during that time. The movie started at midnight, and the yogurt shop was already burning at 11:47 p.m. And in fact, appellant testified at trial that it was "100 percent correct" that Scott could not have participated in the murders because he was with appellant at the time. So, if Scott *did* participate in the murders, appellant's alibi cannot be true.[9]

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[9] There were a few other troubling facts surrounding the incident.

Also, appellant's accomplices had no alibis. Only appellant testified that Scott was somewhere besides the yogurt shop at the time the murders occurred, and no one provided any sort of alibi for Welborn and Pierce. By contrast, the person Briones alleged was his co-conspirator had a rock-solid alibi: he was in prison at the time. And the three other people alleged by Smith to be involved all testified at trial that they were not involved in the murders.

Finally, appellant's confession was consistent with the physical evidence at the crime scene, with Morgan's testimony, and with Scott's admission of guilt to Statham. In other words, the evidence not only contradicted appellant's exculpatory trial testimony; it supported his videotaped confession of guilt.

In summary, appellant confessed. That confession was voluntary. Appellant had no motive to confess falsely, and there was absolutely no reason for the jury to doubt the truthfulness of the confession. Appellant knew that a .380 semi-automatic handgun was used in the murders, and this information was a closely guarded secret known only to law enforcement and the perpetrators. His various explanations for how he knew [*65] that a .380 was used were inconsistent and unbelievable, and he even contradicted himself on the question of whether he had ever owned guns at all. Appellant had previously been seen in possession of a .380 semi-automatic handgun, and on the very day of the murders he was seen in possession of a semi-automatic handgun. Appellant's alibi testimony was unsupported by other testimony

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Appellant's father called the police during the day on December 6, 1991 to tell them appellant and Scott (who were roommates) had been missing since December 4th. In a December 15, 1991 interview with law enforcement, appellant told the police that he and Pierce had picked up Kelly Hannah (appellant's girlfriend) sometime during the evening on December 6th. But Hannah testified that appellant and Pierce were supposed to show up that night but did not.

or physical evidence of any kind. It was contradicted by his own videotaped confession, by Chandra Morgan's testimony, and by Scott's admission to the murders. Not only are Morgan's testimony and Scott's confession inconsistent with appellant's alibi, they are consistent with details of appellant's videotaped confession. The two "alternate suspects" who confessed to involvement in the crime—Briones and Smith—were unaware that a .380 handgun was used, and they implicated "accomplices" who clearly were not involved. Any error in admitting Scott's written confession was harmless beyond a reasonable doubt.

I respectfully dissent.

Keller, P.J.

Do not publish

Date filed: May 24, 2006

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS

AP-74,223

ROBERT SPRINGSTEEN, IV

September 27, 2006, Decided

OPINION

State's Motion for Rehearing Denied.

APPENDIX C

Court Reporter's Record
Volume 63 State's Exhibit 4

TRIAL COURT CAUSE NO. 99-6015
STATE OF TEXAS VS. ROBERT SPRINGSTEEN IV

Michael Scott Transcript
September 9, 1999
Tape #1

Page 81

Scott: Can I take a break, guys? Can I go outside and smoke a cigarette?

Page 102

Scott: Um . . . gentlemen, is there anything that I can read to refresh my memory on that night it happened?

Lara: . . . I have some notes. And I'll just give you the little old ins and outs here. This will help refresh your memory.

Lara: . . . on 2/19 of '98. And this was about 10:21 in the morning. And he asked you about the murders, and you said that you remembered the night of the murders and that you went to the mall about 5:00 or 6:00pm. You said that you didn't remember if you walked there or if you went with Maurice. And you also said that you were hanging out mostly with Robert Springsteen and Maurice. And— but

Page 103

Lara: Maurice would go off and do his own thing some-times and then come back. And then you said to him, sometime after dark, you were

outside the mall smoking a cigarette, and it was after dark.

Lara: And that you were on the side of the mall where you could see the Yogurt Shop. And then you said that you saw a jeep drive out of the Yogurt Shop Parking lot. It turned left and drives away with no lights. You then went back inside the mall and you hung out with some more friends. You didn't remember what time you left the mall, but you said that they, including yourself, saw all the commotion going on over at the Yogurt Shop. And they left the mall in a different direction. Now how in the world could you have said that if you were asleep at 10:30, or dropped off at 10:30 at Springsteen's condo? That's not a little inconsistency—

Scott: That's a lie—a huge inconsistency.

Lara: And then you said Robert may have been with them. And if he was with them, he may have been in the front seat. And Michael, of course, may have been in the back seat. There's no mention of this unidentified blonde male individual, 5'6", 5'7", wavy hair, stocky build. That's bullshit. And you know it is. Then you go on to say that you went—after the mall you all went driving around and you drank some beer. And then you got home, not at 10:30, but you're saying you told him you got home at 2:00 in the morning. And then you remembered going into the woods and shooting Maurice's gun, but you didn't remember exactly what night that was. Then you remembered talking to some big fat Mexican guy.

Page 104

Scott: Yeah, and he drank a big thing of ketchup.

Page 107

Scott: I saw the fire trucks and what not. I lied to the officer about seeing . . . seeing the vehicle.

Hardesty: How come you did that?

Scott: I don't know.

Hardesty: Michael, you lied to him about the jeep, because you're scared of something, because you had some knowledge, and you wanted to throw him off. If you're just volunteering information, and you're not involved in this thing in any way, you don't make something like that up—

Hardesty: Michael, Let's put this fucking thing to bed today.

Scott: I would really like to.

Page 127

Stevenson: Okay. Do you know for sure who shot any of those girls in that Yogurt Shop?

Scott: No, sir.

Stevenson: At the very moment those girls were shot, were you present?

Scott: No, sir.

Stevenson: Did you participate in any way in those murders at the Yogurt Shop?

Scott: No, sir.

Stevenson: And participate means know about it and then lie about it. That hadn't happened?

Scott: As far as I know, it hasn't.

Stevenson: Well, Mike, you would know that.

Page 128

Scott: The only thing I remember is, I remember—was Maurice driving the vehicle and we were driving to her house.

Scott: I remember Maurice saying that he knew who did it, but he did not tell me who did it. And he did not admit to doing it to me.

Stevenson: When did he tell you this?

Scott: I think when he—when the paper was read.

Page 129

Scott: I vaguely—the detectives brought it to light that a paper was bought. I vaguely remember the paper being read, and Maurice saying something about it.

Stevenson: Who read the newspaper?

Scott: I don't remember.

Page 130

Scott: Maurice was present. I was present. Robert was present. I think Forrest was present.

Lara: Who did he say did it?

Scott: I don't remember what was said.

Page 156

Lara: Okay. So you all—are you all circling around? Looking at it? Are you casing?

Page 157

Scott: Yes. Maurice and Robert are casing the joint. I'm along for the ride, guys.

Scott: I think Robert and Maurice had gone in earlier to buy a yogurt.

Hardesty: Were you with them?

Scott: I think I was.

Scott: Earlier in the day. Or just—I remember being in there, guys.

Page 158

Scott: I remember eating and buying a yogurt.

Scott: I think—no. I went in there and I bought a yogurt.

Hardesty: Okay.

Scott: A multi-flavored yogurt.

Scott: I think Robert got something. But Maurice didn't.

Lara: Do you remember who was working there? Which one of these girls was there?

Scott: Eliza may have been.

Scott: I think I was served by Eliza.

Hardesty: Okay. Let's jump forward a little bit. Think real hard, at what point did they decide it was the Yogurt Shop they were going to get the money from? When was that?

Page 159

Scott: I don't know. They – I think they just looked at each other and said, "That one."

Lara: While you were cruising around?

Scott: Yeah.

Scott: I don't know. They had, they had the . . . . it had the fewest people in it. Oh—it had a door open. The back door was open.

Hardesty: The back door was open?

Scott: The back door was propped open.

Hardesty: How was it propped open? What was it propped open with?

Scott: I don't remember. I remember it being propped open.

Page 162

Lara: What does Maurice Pierce tell you to do?

Page 163

Scott: "Stay here and keep an eye out. Watch the car. Keep the car running."

Lara: Who else was in the car with you at that point?

Scott: Forrest and I is all I can honestly remember.

Lara: When Maurice and Rob Springsteen went inside the business, did they close the door behind them?

Scott: I don't remember.

Scott: . . . a very short while later they came back out.

Scott: 10, 15 minutes.

Hardesty: Did you hear anything when they were in there?

Page 164

Hardesty: . . . you're ten feet away . . . Don't hold back.

Scott: I'm not holding back guys. You all made a bunch of memories trigger. I don't remember hearing a loud bang. I don't remember hearing a gun go off. I would remember that.

Scott: I remember them going in, staying in a short while, coming back out—I'm looking around to

make sure there's nobody around. I move—I don't remember driving. He wouldn't let me drive his vehicle. It was his Daddy's vehicle.

Scott: They run back out, got in, "We got what we needed, let's get out of here."

Scott: I asked, "You didn't just rob that place, did you?" I think he said, "Yes, he did."

Page 167

Scott: I guess at the time I was threatened and I was scared.

[Break]

Lara: I got you another drink. Can I get you anything else?

Scott: A phone

Lara: Okay, got you covered....who you need to call?

Scott: My wife.

Page 168

Lara: You know the number.

Scott: Hey, baby, I don't know how much longer I'm going to be here. Evidently I've got more information about this this than I thought I did. I love you. I'll talk to you in a while, bye.

Scott: I have a question.

Lara: Okay.

Page 169

Scott: What's going to happen to me?

Lara: Well, after we're done, we're going to take you home.

Page 181

Scott: I think I was the only other person in the vehicle.

Hardesty: Michael, was another gun talked about? Was there a second gun talked about?

Scott: I think there was a second gun talked about, but I don't know what it is. I don't know who had it and I don't know where it was.

Scott: I think Maurice asked. . . . I think Maurice asked Robert if he was packing one.

Scott: He said, "Yes."

Page 182

Scott: I think I saw it stuck, stuffed into his waistband.

Hardesty: Do you know what a revolver handle looks like?

Scott: Yes.

Page 183

Hardesty: Do you know what an automatic handle—

Scott: Yes sir.

Hardesty: One's rectangular and flat, and the other one is curved.

Scott: It was an automatic handle.

Page 186

Scott: We went into the shop earlier. I remember getting a yogurt.

Page 187

Scott: I was there to buy yogurt.

Lara: The other guys were there to do what?

Scott: I think they were there to case the place.

Court Reporter's Record
Volume 64 State's Exhibit 6

Michael Scott Transcript
9-9-99
Tape #2

Page 3

Scott: I think we parked in the alley. Or we pulled right up front.

Hardesty: Oh, Michael. Michael, you know which one it is. Which one is it?

Scott: I think we parked in the alley. Because I remember looking at the door.

Hardesty: It was propped open?

Scott: No—it wasn't open all the way. It was just—

Page 4

Scott: It didn't close all the way.

Hardesty: How open was it?

Scott: Not real far.

Hardesty: Michael, who went inside that business? Who went inside there?

Scott: Robert and Maurice.

Scott: I think they were going in to rob the place.

Hardesty: Michael, do you see what you're doing? You're still minimizing your involvement in this thing. Why are you doing that? It's just going to fuck you.

Scott: Yes sir.

Page 5

Scott: We parked out behind. They went inside. They did what they needed to do. We came back and drove off.

Hardesty: We came back. You said, "We came back."

Scott: I didn't go inside.

Page 7

Scott: We parked behind the place.

Hardesty: Was the door open?

Scott: Not all the way.

Scott: I'll show you. The door was caught like this.

Hardesty: Do you remember that? Or are you just saying that? Do remember that it was open like that?

Scott: I remember it was open like that.

Page 29

Scott: He said, "Go over to the mall parking lot. Drive around on the other side."

Scott: Go to—drive into Northcross. And I did. I got to there and then I went and changed—I went and got back in the back seat. And I asked, "Did you actually rob that place?" And they said—I think Robert said, "Yes, we did." It was either Maurice or Robert. I don't know.

Hardesty: So you're remembering some more stuff now, Michael, than you did before?

Scott: A little bit.

Hardesty: Michael, Let me tell you something. I think those doors. . . I think those doors are real significant back in the alley. Okay? And you can't get

through those doors—those doors are like symbolic. You can't get through those doors. Do you know what I'm saying?

Scott: Yeah.

Page 32

Scott: I don't remember.

Hardesty: Michael, look at me. We need to do this today. You do remember. Forrest was with you all and he waited out in the car. Because he's the dipshit.

Scott: Yeah.

Hardesty: Right. And you said, "We ran back to the car." You said that several times earlier. Well, "we" is right.

Scott: I'm not trying to play a game with you all.

Scott: Look, can I tell you all what I keep seeing in my head?

Hardesty: Tell us what you keep seeing in your head.

Scott: I keep seeing these girls get shot.

Hardesty: Right. Tell us what that looks like. Tell us what you see, specifically.

Scott: I remember seeing girls—I remember seeing them down—I remember one girl screaming terrified.

Page 33

Scott: I remember hearing a girl scream and run off. I remember Robert—

Scott: She runs towards the front of the ~~door.~~

Scott: Robert went over there and grabbed her.

Hardesty: Okay. What happened then?

Scott: I remember them getting the girls down on their knees.

Page 34

Hardesty: All right. Rob grabbed one of the girls. She was running towards the front of the store. What did he do with that girl?

Scott: Um...he spun her around. We got—we moved to where you couldn't see out the doors. Out the glass out front.

Hardesty: You're remembering what happened.

Scott: I don't honestly remember going in the building.

Page 35

Scott: Urn . . . Maurice goes to the register. After—they got them behind the counter.

Hardesty: What did they do when they got them behind the counter?

Scott: They got them down on their knees. I think they were laying down?

Scott: I think it was Maurice who went to the register and opened it up.

Scott: And him asking where the rest of the money was.

Scott: One of the girls said, "There isn't any more. They've already made their drop." And I remember Maurice getting pissed off, losing his temper.

Scott: And screaming, "Where's the money?" She said she doesn't know. I guess he pulled the trigger.

Page 36

Scott: He looked at the next girl, "Where's the money?" She said the same thing. And um . . . he pulled the trigger.

Scott: Um . . . I seen the first two girls get it.

Scott: I think they were still on the floor.

Scott: Kneeling on the floor.

Page 37

Scott: I remember standing at the back of the store—

Scott: All I remember is standing inside and seeing the first two girls get shot.

Page 45

Scott: "The money's not here." It's . . . it's—"The money's not here."

Hardesty: And what did Maurice say?

Scott: "There has to be more than that. The business day is over."

Hardesty: And what did she say?

Scott: "We've already . . . um . . . we've already made the drop."

Scott: He asked her again. And I think he shot her.

Page 46

Hardesty: Was she crying?

Scott: Yeah. She was crying.

Lara: Was she tied up?

Scott: Yes.

Scott: I . . . I remember it being white.

Hardesty: And you're seeing this happen. What is Rob doing?

Scott: He's looking around for a safe or a—he's getting stuff ready—he's got something flammable.

Hardesty: What is it?

Scott: Um . . . I remember a red can.

Page 47

Scott: Um . . . I remember him looking at the two girls. Robert is getting the place ready to burn.

Page 48

Hardesty: Okay, Michael, who's got that second gun?

Scott: Um . . . Rob does.

Hardesty: What kind of a gun is it? What does it look like? You're in the store.

Scott: A small caliber automatic.

Hardesty: Who did he fire it at?

Scott: I don't know. . .

Scott: Because I was running towards the door. Back down to the door. I . . .

Page 49

Scott: . . . wanted out.

Hardesty: Tell me about the other two girls.

Scott: They were scared. They were crying. One of them said she didn't want to die.

Hardesty: Who tied those girls up?

Scott: Um . . . Rob did.

Hardesty: All four of them?

Scott: I guess I did.

Hardesty: . . . What were they tied up with? Come on, Michael. You know.

Scott: It was white—it was—I remember it being stretched with—I think it was a T-shirt.

Page 50

Hardesty: And you helped Rob tie them up?

Scott: I think—I guess I did.

Hardesty: Yeah. You did. What were the girls wearing by the time they were tied up? What were they wearing? Michael, that's a gimme. That's an easy one.

Scott: Not a whole lot.

Scott: Used their own clothes to tie them up.

Hardesty: Used their own clothes to tie them up. You and Rob. And by the time you were done, what were they wearing? Say it.

Scott: Nothing.

Page 51

Scott: Um . . . I think Robert shot the second one.

Scott: I think it was a semi-automatic.

Scott: He shot her in the back of the head.

Hardesty: . . . The other two girls are still on the floor and they're alive.

Scott: They're on the floor and they're alive there crying.

Scott: I looked up and said, "This is wrong."

Scott: They um . . . Maurice looks up at me and says, "You open your mouth and you're dead too."

Page 52

Hardesty: What happened to the other two? You know, Michael. Don't ask us. You know.

Scott: I'm asking myself the question. I remember one getting hit.

Hardesty: Who hit her?

Page 53

Scott: . . . Maurice did.

Page 54

Scott: I'm trying to cut through a fog.

Hardesty: What did they make you do?

Scott: I remember kicking, I remember hurting the other one. Um . . . I don't—I don't think I raped them. That's not me. Was one of them raped?

Hardesty: Michael, tell us the truth. Was one of them raped? Or two of them . . .

Page 55

Hardesty: . . . raped? Or all of them raped?

Scott: I think one of them got raped.

Hardesty: You think one of them. Which one? Do you remember?

Scott: No. I don't.

Page 56

Hardesty: Whoever raped her, Michael, how was she raped? How did that happen?

Scott: Um . . . she was still on her hands and knees. They got her up on her hands and knees. And started going at her.

Hardesty: Who did?

Scott: Um . . . I think Robert did.

Lara: You know the answer to that one. How were they killed?

Scott: I think one was strangled to death.

Scott: I didn't rape anybody.

Scott: Robert raped one.

Hardesty: How did he rape her?

Page 57

Scott: He—I think he bent her over and just got her. Went after her. Um—

Lara: You need to push a little harder. Come on.

Scott: I remember something about the neck. I don't know if—

Page 58

Lara: It's time to let go, man. It's time to let go and just put it behind you.

Scott: I remember them being tied up with their clothes. I remember the two getting shot in the back of the head.

Scott: I remember one of them getting raped. Because Robert had an itch.

Page 59

Scott: I didn't rape them. I know that.

Hardesty: All right. You didn't rape them.

Page 60

Lara: You're starting to minimize again, Michael.

Hardesty: . . . What did those boys make you do? It ain't kicking, it ain't strangling, it ain't bludgeoning, it ain't knifing. What did they make you do?

Scott: I remember the fire.

Hardesty: Before the fire, Mike.

Page 61

Scott: They didn't make me shoot them, did they?

Hardesty: Well, did they? Tell us. I want to hear it. Did they? Did either Maurice or Robert make you shoot those two girls? Or both of them? Say it, Michael? Is that what happened?

Scott: I think so.

Hardesty: What gun did you use?

Scott: I don't remember.

Hardesty: Who handed you a gun?

Scott: Maurice handed me a gun.

Hardesty: What kind of gun was it?

Scott: It was the revolver.

Page 62

Hardesty: . . . Where did you shoot them? Where on their bodies?

Scott: Quick easy kill, in the back of the head. The head. Temple. Or back.

Hardesty: Back? Or temple? Which one?

Scott: Back of the head.

Page 63

Scott: He said, "You shoot them." I said, "No." And then he said, "You either do it, because we're all in this neck deep."

Hardesty: What did you do?

Scott: I shot them.

Hardesty: Both of them?

Scott: Yeah.

Hardesty: Okay, in the back of the head?

Scott: Yeah.

Hardesty: Are you sure?

Scott: Yeah.

Page 64

Hardesty: Okay. What was Rob doing this whole time?

Scott: Watching me.

Hardesty: Did he say anything to you?

Scott: "Do it, Mike."

Hardesty: Did he say that?

Scott: Yeah.

Scott: "Do it or your next."

Hardesty: Was he holding a gun?

Scott: It was some kind of automatic.

Scott: I think Robert shot one of the girls with it.

Page 65

Hardesty: . . . When he shot that girl, where on the body did he shoot her?

Scott: Back of the head.

Hardesty: . . . Where was she in the store when he shot her?

Scott: Behind the counter.

Page 77

Lara: Do you remember being inside that business?

Scott: I don't—I remember walking in here and getting something to eat. I don't remember walking through the door. I had a nightmare that I saw two girls get shot. I don't remember—I don't remember what happened to these two.

Lara: Just take your time. Okay?

Hardesty: . . . if you could close your eyes...try to remember voices.

Scott: Lot's of screaming.

Page 78

Scott: I hear the same questions being asked again and the same answers being given.

Scott: I hear the gun go off again.

Scott: "Either shoot them or you're next."

Scott: I remember looking at this girl. I cry. I hear Robert saying, "Do it. Do it."

Page 79

Scott: ". . . Do it." I hear the gun go off. I only pulled the trigger once. I turned around. "Here's your stupid gun." I'm in shock by then. I hear another gun go off. I think I hear a total of five shots.

Page 80

Hardesty: Michael, you mentioned one of the girls was raped. And Robert did something to her?

Scott: Robert had an itch.

Scott: I remember helping tie . . . I remember getting done and saying, "Watch the front." And I watched the front.

Hardesty: Who said, "Watch the front?"

Scott: Robert.

Scott: I don't know because I didn't look. I don't remem . . . . I didn't look. I . . .

Page 81

Scott: . . . didn't want to look. They didn't have any clothes on by that time.

Hardesty: Okay, Michael. Let's back up a little bit. How did their clothes end up . . . . how did they end up naked? Who took their clothes off?

Scott: Rob did, I think, while I was holding them.

Hardesty: Okay. All four of the girls?

Scott: Yes sir.

Hardesty: You were scared by that point.

Scott: Scared out of my mind.

Hardesty: Okay. And what did you all tie the girls up with?

Scott: Clothes.

Hardesty: Whose clothes?

Scott: Theirs.

Hardesty: Okay. Can you tell us specifically?

Scott: T-shirts.

Hardesty: T-shirts. What? Anything else?

Scott: T-shirts and blue jeans and whatever undergarments they had on. I don't remember them having undergarments.

Page 87

Scott: Okay. My problem is, is I've hit a bunch of blocks . . . Um . . . I remember casing the place.

Scott: I remember them—I remember them casing and I remember them talking about it, but I don't remember the details.

Merrill: Who is "them?"

Scott: Rob Springsteen and Maurice Johnson. Forrest didn't say a whole lot and I didn't say anything. It was wrong to begin with. Uh, I honestly don't remember going inside, through the doors. But I've pulled details out of my head that should not have been there. Um . . . I had a reoccurring nightmare. I see the first two girls get . . .

Page 88

Scott: . . . shot, in the nightmare, in the back of the head. They're tied up with their clothes. Um . . . um . . . I honestly—I know there was . . . Maurice piled up stuff to burn.

Scott: I remember . . . I remember the 22 revolver. I guess it was. I knew Maurice had the revolver. I was there when he bought it. Um . . . when you pull up to the area you can see the door over here and you could see that it was ajar. Because we had—after we had done this, we had gone through the lot and looked at the building. And one of them piped up and said, "The door's open."

Scott: I d[illegible] want to do this, man. The car was here. For[illegible] got out into the front seat.

Page 89

Scott: What I kept running into was—by my memory, I was in the car. But, yet, I've been able to pull detains out of what's happened in here. Like the girls being stripped and tied up with their own clothes, how the first two girls were killed, and then I hit a wall. I'm trying to be honest with you, sir.

Merrill: I understand.

Scott: I can't honestly say I remember how the other two girls were shot. Now, I—I remember Reese handing—shoving a firearm at me saying, "You shoot one. You're in this neck deep with us." This all sounds contradictory. Doesn't it?

Merrill: . . . those doors will come down, if you want them to. And we want you to want them to.

Scott: I want them to come down. I—I don't want to go to prison.

Merrill: I can understand that.

Scott: I want them to come down. I want to prove that—I didn't this at . . . I didn't do this at my own free will.

Merrill: From what they're telling me, you were almost forced into this.

Page 92

Merrill: Did you do anything else with that gun?

Scott: I heard it go "bang" and I went—I either dropped the gun—I think I hand . . . I threw it back at um . . . Reese.

Merrill: What was Rob doing?

Scott: I think Rob was scratching his itch.

Merrill: And what does that mean to me?

Scott: I think he raped one of them.

Page 100

Merrill: Okay. Did you help undress any of these girls? Did they undress themselves? What happened there?

Scott: They were ordered to undress themselves.

Merrill: Did they?

Scott: Yeah. After a threat.

Scott: I remember them getting undressed.

Scott: They weren't really fighting. Um . . . I was ordered to come help tie them up, and I did. I helped—

Page 101

Scott: I'm at the front looking out front. Rob's at the back.

Scott: Rob is controlling the girls. Maurice is looking for money. And um...not finding what he wants, and asking questions.

Merrill: And Rob's uh, Maurice is looking for?

Merrill: Money. And Rob tells them to get undressed?

Scott: Yes sir.

Scott: They're crying

Page 102

Scott: They're doing what they were told. They don't—one of the girls said, "I don't want to die."

Page 114

Scott: I remember two.

Merrill: Let me ask you this—These girls screamed, didn't they?

Page 115

Merrill: How did they shut them up?

Scott: I think Robert turned around and said, "Shut the fuck up or you're dead."

Scott: No. It didn't work much. And then I . . . I believe he went over there and hit them. I don't know with what, because—I was looking out the front door. I didn't want to see this.

Scott: Yeah. I remember a lot more screaming and crying.

Scott: . . . A lot more hysterical.

Scott: Yeah. I remember the gun being pressed into my hand. And . . .

Page 116

Scott: saying, "Do it. Shoot one. Shoot one or both." I couldn't—I looked at that gun for a good minute or so. And I remember Robert—"Don't be a pussy man, do it."

Scott: Yeah. I remember the whole screaming—"We're dying. We're dying. Please don't kill me."

Merrill: What are you going to tell your wife?

Scott: I don't know. I'm not going to tell her anything. I can't.

Merrill: Why?

Scott: I think I killed somebody.

Page 117

Scott: I guess I suppressed it all out of my head.

Scott: I don't want to sound like—the bottom line is, I don't want to go to prison.

Merrill: I can understand that. I wouldn't either. Do you think you deserve to go?

Scott: No. Well, yeah. I shot somebody.

[Break]

Court Reporter's Record
Volume 65 State's Exhibit 10

Michael Scott Transcript
9-12-99

Page 5

Scott: Yeah. She keeps asking me do I need a lawyer. And I keep telling her it's only going to complicate matters right now.

Court Reporter's Record
Volume 65 State's Exhibit 18

Michael Scott Transcript
9-9-99
Tape #3

Page 3

Merrill: What was the plan, at that point?

Scott: As far as I know it was to go in and look in the place and see what the setup was and get some yogurt.

Scott: Urn . . . I didn't know the plan when we went in there. Robert looked at me and said, "Come on." I followed him out the door—the back door, while Maurice was being a distraction.

Scott: I just remember heading towards the back. We went out the back door and we walked—

Scott: We walked out, on the right, and walked up the wall, and around . . .

Page 4

Scott: . . . the side. And by the time we got back out and around, Maurice was already in the vehicle munching on a yogurt. I remember eating some of it and thinking, "This is my favorite kind of yogurt."

Court Reporter's Record
Volume 65 State's Exhibit #20

STATE'S EXHIBIT NUMBER 20 DESCRIPTION
(INTERVIEW) SEPTEMBER 10, 1999

Michael Scott Interview
September 10, 1999

Page 2

Merrill: . . . You've got something on your mind right now. What is it?

Scott: Yeah. I do.

Page 3

Merrill: Let's hear it.

Scott: I dug myself in a hole yesterday in this room and I don't know how to get out of it.

Merrill: Yesterday is helping you get out of it.

Scott: Is helping me get out of it. But what I'm saying is, is I think I lied to you all yesterday. And I'm not sure if I lied to you all or not.

Merrill: What does that mean?

Scott: I know I went into the place. I know I walked in. I know now that I walked into that place.

Page 4

Scott: Rob and Maurice go into the place. Forrest is sitting here. I'm sitting here. They go in. I look at Forrest. I'm not saying anything to Forrest. I go inside. I hear the gunshots from outside. But I know details. See, I'm questioning myself as to what really happened.

Scott: I hear gunshots.

Scott: I am. I hear the gunshots. I get out of the car. I go to the door. I open the door. I start to walk in. I don't remember seeing—I don't know if this is real or not or if this is what I convinced myself of at the time.

Merrill: What.

Scott: Or if I've convinced myself of this now. Is what I'm—I need help. I need memory cues. I need something to help trigger it. What I remember doing—or what I think I remember doing, is how I should put it, was I was initially in the car. Forrest and I were supposed to watch the lot to see if anybody come out there. I heard the shots. I go in. I go through the doors. Rob's coming—I see Rob coming down the hall. I don't remember seeing the girls. I didn't see Maurice at the time. I come back out. Forrest isn't in the car. I get in—

Scott: Forrest is not in the car. He's gone. I think he got out and he run off. Rob and I get in the car. Then Maurice comes out and we go. But this is total contradictory to what I said yesterday.

Merrill: You're trying to shut a door. In my opinion, you're trying to shut this door. Because yesterday you told us some things about the inside of that place that were very specific.

Scott: Very specific. And I should not have known.

Page 21

Scott: We're sitting in the mall around this round table. Forest, Maurice and Robert. I remember, I remember Maurice saying he needs some money. I don't remember the specific details of what was said. I remember hanging out in the mall Bs'ing with friends. I remember the robbery being discussed, but not the details. Or a robbery being discussed, but not the details. It had not been decided yet where. Everybody goes—Maurice gets up and walks around. I get up with Robert and we walk around looking at the tits and ass running around the mall. I remember walking up the ramp through the mall, and back down. Back to the table. I remember getting up, going out to the car, driving around the Northcross area, and looking for a place. I remember pulling up pin front of the IBC. I remember Maurice going up to the counter and getting a yogurt—the swirled flavored one. I think, but I'm not positive, Rob and I went to use the bathroom. We came out. Somehow we ended up going out the back door. I don't remember where the back door is, but I remember walking out the back door and walking along the wall back to where Maurice was in

the car. I think Forrest came in to use the bathroom, but I'm not sure. I'm not positive. We get back in the car. We either went back to the mall or drove around the neighborhood first and went back to the mall. But one way or another, we went back to the mall. I don't remember if it was discussed anymore at the table. We stay in the mall until late. I remember the theater letting out as we were walking back to the car. I think just about everything in the mall was closed. We get back in the car. We drive around the neighborhood. We make a . . .

Page 22

Scott: . . . couple circuits of the neighborhood making sure there's no police around and there's . . . there's no extra people around. We pull up to the back—we pull up into the alley. Forrest is still in the car. We get out. We all go inside. Yeah, that's—I remember standing there blocking the back way out. I remember one of the girls trying to run out the front door but the door couldn't be gotten open. She gets spun around and brought back to the back. I check the front. The door is locked. I still remember the keys being in the door. I remember Robert hollering at me telling me, "Come help. Come help me with this." I go back. I help bind the girls. Their own clothes are used to bind the girls. I remember tying them with something white. I don't remember whether it was a T-shirt or their bra or undergarment, or what. Rob says, "Go watch the front." I hear the register open. I hear, "Where's the rest of the money?" "You can't get to it." Maurice gets pissed off and I hear a bang. I look back. I look at the noise. I look back out the window. I hear the

same question being asked and the same response. I hear the girls crying, "I don't want to die." I hear another crack—another gunshot. I'm looking out the window. I remember going back to find out what's going on. I remember looking at the gun. I remember hearing, "you better do it because you're neck deep in this already." I remember hearing, "Don't be a pussy. Do it. Just do it." Then I point and pull the trigger. I . . . I remember Maurice gathering up napkins and cups and towels and stuff. I remember walking towards the back door and hearing another crack—or hearing another shot. I remember stopping at the door and looking to see, and here comes Rob. Rob and I both then go out and get in the car. I sit behind the driver—where the driver's seat is. Forrest isn't in the car.

Page 50

Scott: I honestly do not remember shooting.

Merrill: Earlier you were damn sure you shot. You're scared, Mike.

Scott: I'm scared I killed somebody and don't fucking know it.

Merrill: I ain't buying that shit at all.

Merrill: You remember. You don't want to say it.

Merrill: You don't want to be a murderer, do you?

Scott: I want to find out whether I did it or didn't.

Page 52

Merrill: And at one point, Mike, you even said you shot two of them. Didn't you?

Scott: No sir. I didn't.

Merrill: Are you sure about that?

Scott: No, I'm not. I can't even remember half of what I said yesterday. I'm trying to remember. I don't remember.

Merrill: But you ain't him. You're on the floor doing the deed. You're participating, you're working with, and you're doing things in there. And while ago you said, "I think I set the fire."

Scott: Yes sir. I think I—

Scott: You helped me trigger a memory.

Merrill: Okay. How? What did I say?

Scott: You said "firebug." And, yes, at one time I was a firebug.

Page 53

Merrill: Did you set the fire, Mike?

Scott: Yes sir.

Merrill: Where?

Scott: I don't remember where.

Merrill: Oh—now I ain't buying that. I ain't buying selective memory, memory loss. You know you set the fire, but you don't know where?

Page 55

Scott: I—I—I keep hitting a wall.

Merrill: Yeah. I think we're done.

Scott: Are you all going to keep me here?

Merrill: No. You're not under arrest. Mike, you can get up and walk out this door anytime you want.

Page 57

Scott: I don't remember pulling the fucking trigger. I don't even remember having a gun in my hand. I was telling you all what you all wanted to know.

Merrill: Nah, I ain't buying that. I ain't buying that at all, Mike.

Scott: I'm not buying it myself.

Merrill: You know too much . . . . you know too much about the inside of that place that somebody that wasn't there wouldn't know. Do you understand me?

Scott: Yes sir.

Page 58

Scott: Do you all have a drawn layout of what the inside of the place looks like?

Scott: Can I be allowed to look at it?

Merrill: We've thought about that. And we're continuing to think about that.

Scott: Okay. I . . . I think it will help.

Merrill: Do we need to talk any more? Or are we done? Or what? What do you think? Are we going to straighten all this out?

Scott: I only shot the gun one time.

Page 59

Merrill: What did you remember when I scared you?

Merrill: You remembered something else. "I set the fire."

Scott: Yes. I set the fire but I don't remember where I set it at. I remember piling it all onto—I remember piling all that stuff on top of something.

Merrill: Okay. What stuff are we talking about?

Scott: Napkins, cups, anything burnable in the place.

Scott: I remember a can of Zippo fluid.

Page 60

Merrill: Where did that come from?

Scott: Out of Maurice's car.

Page 64

Scott: I smell paper, I smell paint, I smell cotton burning, I smell—

Abreo: Go ahead, Michael.

Scott: I set them on fire.

Abreo: It's all right, Michael.

Scott: (Crying) I set them on fire.

Page 65

Scott: I remember I saw—they hadn't loaded the cups back up where they were supposed to be. They were laying out. I picked the thing of them up and . . . and threw them into the pile. There was a thing of napkins laying out there. I threw it into the pile.

Abreo: How close was the pile to the girls?

Scott: I don't remember yet. I will remember.

Scott: They were all laying down.

Page 66

Abreo: Michael, you can remember that. Because you're spraying lighter fluid on them. You're spraying every one of them with lighter fluid, Michael. What was the reason for the fire?

Scott: Because—

Abreo: Go ahead and tell me.

Scott: I was brought into this—I didn't—

Abreo: What was the reason for the fire?

Scott: To destroy evidence.

Page 67

Abreo: Who all lit lighters to light the fire?

Scott: Maurice and I. I and Maurice. He had one too.

Scott: No sir. I remember . . . I staggered out.

Abreo: Why did you stagger out?

Scott: I was . . . . I was sick. I was in . . . I was . . . I was sick.

Abreo: Why?

Scott: At me. For what I had done and participated in.

Page 68

Abreo: Which is what, Michael?

Scott: I helped commit murder and—

Scott: They made me shoot her.

Abreo: And what else? What else did you do that made you so sick, Michael?

Scott: I . . . I burned them.

Merrill: What else did you do?

Scott: I can't—

Merrill: What else happened to those girls before the fire was set?

Scott: They made me rape one of them.

Abreo: Which one, Michael?

Scott: I can't recall a face. I can't see any of their faces. They made me rape one of them. They made me shoot somebody. I deserve to die.

Page 73

Scott: I pulled one on top of the other. I threw all the stuff on them.

Scott: I lit the fire. I remember seeing the smoke and the nasty smell. And I ran out.

Scott: Yes. I want this to be done. I want whatever is going to happen to me to happen.

Scott: I want them to fucking go to prison for what they made me do.

Merrill: Work with us, Michael.

Scott: Keep asking me questions.

Page 76

Abreo: How many times had you tried to rape that girl?

Scott: Twice.

Abreo: Okay. Now when you were up looking into her face, when you looked into her face, what did you see, Michael? Was she crying, Michael? Was she saying anything?

Scott: She could not.

Scott: She was gagged.

Scott: She had some . . . she had something stuffed in her mouth.

Abreo: Okay. What do you think it was, Michael? What do you think she had stuffed in her mouth?

Scott: It was something—I remember—

Page 78

Scott It was white.

Merrill: What is that?

Scott: Come out—what is it? What was it?

Merrill: You know what it was. There's no doubt in my mind. Because she's sitting here going—

Scott: And it's hanging out of her mouth.

Merrill: What is it?

Scott: A towel. A white Terri-cloth towel. A white towel.

Page 79

Scott: There wasn't any noise other than whimpering coming out of them.

Page 80

Merrill: What else was going on?

Scott: I remember Rob off to my right. My right side. He was—he—he had the Hispanic girl. He had her up on her—he had her up on her—he was fucking her from behind.

Scott: I remember her giving him a hard time.

Scott: She's fighting, she's moving.

Page 81

Scott: He does her. He does her. And I want to say he shoots her in the back of the head.

Court Reporter's Record
Volume 65 State's Exhibit #16

STATE'S EXHIBIT NUMBER I6 DESCRIPTION
(AUDIO TAPE)

Tape 2- 9/I3/99

Page 5

Lara: . . . Did you tell your wife you were involved in these murders?

Scott: She knows that I was involved in something real bad. She knows—she's scared. She knows I was . . . she knows I was involved, guys. She's . . . she's done a lot of figuring out herself. I haven't come right out and said it to her.

Scott: I told her at the minimum I'm looking at time. And at the extreme I'm looking at the death penalty.

Scott: . . . Patrick. Doing something like that. "Man, all the years I've known you, if I knew you'd done something like that, I would have taken something like that out on you."

Fuentes: Did you tell him why you did it?

Scott: I told him it was self-preservation. It was—do it or you're next.

Lara: Who is this guy, Pat?

Page 6

Scott: Patrick is—oh, man. Pat is this guy—Patrick (inaudible). A long, long time. I met him right after this shit happened.

Scott: I've told them I'm in a lot of fucking trouble. I've told them there's three other guys telling

another story than what I've got. Um...I've told them unless I can come up with this crucial piece, I'm screwed. Um...I haven't come out and right out flat out told anybody what happened. I mean, my Dad figured it out. Just my Dad.

Scott: Me, my wife, and my Dad. The kid was asleep. We stepped outside and talked. I said, "Hey, look Dad, I'm in a lot of trouble." He said, "Could you tell me what?" "I can't tell you specifically what Dad Think about seven or eight years ago. Think about who I was living with."

Fuentes: What did he say?

Scott: "Well, son, I'm really sorry. You're in deep. You can't go back and change the past."

Page 7

Fuentes: Do you think he suspected anything back then?

Scott: I think he did. Because, I mean, I'd come around their house and I was—I was in a daze.

Fuentes: Yeah. Mom and Dad's know a lot. They read their kids.

Scott: Mom and Dad knew there was something wrong with me. I can't . . . I kind of remember showing up at my parent's house after that. And I think I wanted to tell my parent's—I wanted to tell my parents, "I'm not sure, but I think I did something bad. I need help. I'm scared for my life. I'm scared to talk to anybody." I mean, I'm not scared—I'm pissed off at these guys. I've never seen my Dad cry.

Page 12

Scott: We stopped the car. Forrest is supposed to honk the horn if anybody shows up. We go inside. We

go inside. We go inside. One of the girls—Rob has one of the girls. She gets spun around. She gets shoved back towards the back. I'm right behind him. I follow up right behind Robby. I check the door. The door's locked. I'm looking out that front glass. I hear the, "Come help me with this." I go over to where Robby's at. I help him bind the girls. Paper towels. Robby handed me like paper napkins. "Here, stuff these in her mouth." Because I remember my finger poking through the napkin. I get up. I go look out the front door again. I go back. I look at Robby. This is going to seem stupid to you all. My wife's allergic to cats, but I love cats. It doesn't purr though. I look out that front door. I look out that front door. I come back and I look at Robby. Robby's got one of these girls and—

Scott: Robby's got her up on her hands and knees. And I don't remember her having any clothes on. And I'm . . . I'm looking at Robby. I don't know if I was saying it out loud, "This is wrong, man. This isn't what you said."

Scott: He's . . . he's raping her.

Page 13

Scott: He's got her up on her hands and knees and he's raping her.

Scott: I remember her having dark hair. I don't remember seeing her face. I couldn't see her face.

Lara: I'm looking and going, "This is wrong."

Scott: I remember him getting done and standing up and looking at me. "You're in this all the way, Mike. Do her." I remember trying but not being able to do it.

Scott: No. I remember feeling sick and disgusted with myself. I remember being sick and disgusted with myself and looking at this gun. I remember my ears ringing. I remember the one that I tried to . . . to rape still being alive. Robby handed me the gun and I look at the gun. "This is wrong." I remember hearing, "Just fucking do her or you're next." I pointed that gun and I pulled the trigger. And I didn't want the gun anymore. But I don't remember if I dropped the gun or I threw it at Robby or I handed it back to Robby.

APPENDIX D

VOLUNTARY STATEMENT

(EXCERPTS)

At 10:39 o'clock a.m. on the 14th day of September, 1999, and before making the following statement, I, Michael James Scott, while at the Austin Police Department was warned by Detective Manuel Fuentes, to whom this statement is given, of my rights as follows:

1. I have the right to remain silent and not to make any statement at all, and that any statement I do make may be used against me at my trial;

2. Any statement I make may be used against me in court;

3. I have the right to have a lawyer present to advise me prior to and during any questioning;

4. If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning; and

5. I have the right to terminate the interview at any time.

I, the undersigned, received the foregoing warnings. I fully understand each and all the rights contained in this warning. I do hereby knowingly, intelligently and voluntarily waive all my above rights. I make the following statement in writing without any threats or promises of any kind having been made to me

My name is Michael James Scott; I am 25 years old; I was born on 02/06/1974.

I am currently at the Austin Police Department homicide office at the Twin Towers giving this statement to Detective Manuel Fuentes and Texas Ranger Sal Abreo. I am giving this statement about my involvement in the death of the four

girls at the yogurt shop on December 6th, 1991. I have previously given accounts of what happened in 1991 and afterwards to Detective Fuentes, Texas Ranger Sal Abreo, Detective Merrill, Detective Ron Lara and other detectives. Today I told Detective Fuentes and Texas Ranger Sal Abreo that now that I have confessed to my father and my best friend Patrick Davidson in my part in the girls' death, I have been able to remember and I want this statement to be correct and truthful. These things I will clear up in this statement such as what I threw off the bridge after the murders. I had previously said that I threw a set of keys off the bridge; it was actually a cutting knife that I got from the inside the yogurt shop. And when I told you that I didn't really remember what happened to the second gun, the small semiautomatic pistol, I do remember that I gave it to my friend Patrick Davidson in December 1992 so that he could get rid of it. I did not want to pull him into this, and that is why I had been so hesitant to tell you what happened to the gun. If something happens to him, he has nothing to fall back on. I will explain this more in detail later.

On December 6th, 1991, I don't remember exactly what time it was, but it was still daylight. Drove up to the strip mall where the I Can't Believe It's Yogurt shop was at. Go inside and take a look at the yogurt shop. Got up and made it look like going to the restroom. Walked out the back and walked around to the front of the building. Drove back to the mall. Left Northcross Mall. Drove through the alley behind the stores to see if the back double doors were still slightly open. The building was on the driver's side, the left side of the car.

I brought the can of Zippo lighter fluid. It was the bigger metal can. Went into the back door. One of the girls said something like, "Hey, you, what are you doing? You don't belong in here." This girl was wearing a T-shirt. I believe, that had the name I Can't Believe It's Yogurt on it. I believe that she was working in the back room. Expected to find only

two girls inside the store, and there were two other girls up front in the dining room area sitting down. I could see the commotion going on up front. I checked the door, and it was locked. There was one key in the lock; the door was locked. I looked outside to make sure no one was looking in. As this went along, I got more and more scared. I looked out to check the front again. I heard the girls crying and one of the girls say that that's all there is. It's already been dropped and you can't get to it. I went back there. I saw that all four girls were naked. I went to the pile of the clothes and picked up some clothes to use to tie them up.

I remember a T-shirt and a bra used to tie them up. The girls were crying and whimpering. They were begging not to kill them. They said that they didn't want to die. I got a paper towel and put it inside one of the girl's mouth. I remember that my finger pushed through the towel when I was trying to stuff it in her mouth. This may not have worked, so I might have had to use something else to stuff in her mouth. It was white like terry cloth. The girls were on their knees. I don't believe they were standing up because I was looking down at them. I went to the back and saw one of the dark-haired girls on her hands and knees. I got on top of her. I tried to do her from the front. I looked at her face. I didn't want to look at her face. She had a piece of a white terry cloth towel on her mouth. I looked away because I didn't want to see her. I couldn't get it up because I knew that what I was doing was wrong. I sort of faked it. The girl was still on the floor. I pointed the gun at her and tried to shoot at first but couldn't. I pointed the gun again at the girl and fired once into her head.

I don't remember seeing a safe, but I don't remember what she was doing down on the floor. I remember looking in the doorway, and the gun is still in my hand. I saw the side profile of this girl. She had like a white shirt on. I think I shot her in the head. I've been not wanting to remember this. I know I've told you something different, but I did her too. I

dropped the revolver. I thought I left it in the car. I looked at the floorboard and picked up the lighter fluid. I went back inside. I saw the girls laying there and I pulled one of the girls on top of the other. I gathered up napkins, cups and paper towels and piled them on top of the three girls. I sprayed Zippo fluid on top of the girls. I emptied the can of lighter fluid. I had a Zippo lighter with me and lit the fire. I heard a whoosh sound of the accelerant when it caught fire. I don't remember what I did with the can. I could have threw it in the pile of stuff in the back of the store.

I remember that my only thought was to get out. I went outside. I had taken a knife from inside the shop. I believe I got it off the counter. It was a nice knife. I told you all before that I had taken a set of keys, but it was a knife; I remember now that it was a knife.

I remember driving but I don't remember what direction.

I got out and threw up over the railing of the bridge. I took the knife and I threw it over the rail also. I made sure it was gone. I remember trees and I don't remember seeing any water. I got back into the car. I don't know what happened next. I remember being back at the apartment.

Detective Fuentes asked me to describe the two guns. A black .22-caliber revolver, small; I think it had wood grips. A small, semiautomatic pistol; it had a clip. I think it was a .38. Some of the writing on the gun was scratched off.

On the weekend I rode to San Antonio. I got a hold of a newspaper and I remember reading about the fire and the yogurt shop murders. I read it out loud. I remember getting back home and wanting to do nothing more than sleep. The semiautomatic was laying on the bed. I knew that I had to get rid of it. I picked it up and left the apartment. I remember walking past a dumpster and thinking that I should just throw it in the dumpster. I walked into the creek in the apartment. complex. I put it in a hole in the side of the wall in the creek.

I wedge another rock in it. I stacked some rocks near it as a marker to remind me where it put it.

In December of 1992, I was smoking a lot of pot. I had been drinking a lot too and started having flashbacks. I went back out to the creek and found the gun. I took the gun and put it in a brown paper back that I found in the creek. I took the gun back to south Austin to our apartment. I told Pat that I needed to get rid of what was in the sack. I didn't tell him. He told me that he put it out in the trash.

I can read, write, and understand the English language, and the above statement I have read, and it is true and correct to the best of my knowledge and belief. Signed, Mike J. Scott.

APPENDIX E

VOLUNTARY STATEMENT

AT 10:39 O'CLOCK A.M.ON THE 14TH DAY OF SEPTEMBER, 1999, AND BEFORE MAKING THE FOLLOWING STATEMENT, I, MICHAEL JAMES SCOTT, WHILE AT THE AUSTIN POLICE DEPARTMENT WAS WARNED BY DETECTIVE MANUEL FUENTES, TO WHOM THIS STATEMENT IS GIVEN, OF MY RIGHTS AS FOLLOWS:

___ 1. I HAVE THE RIGHT TO REMAIN SILENT AND NOT TO MAKE ANY STATEMENT AT ALL, AND THAT ANY STATEMENT I DO MAKE MAY BE USED AGAINST ME AT MY TRIAL;

___ 2. ANY STATEMENT I MAKE MAY BE USED AGAINST ME IN COURT;

___ 3. I HAVE THE RIGHT TO HAVE A LAWYER PRESENT TO ADVISE ME PRIOR TO AND DURING ANY QUESTIONING;

___ 4. IF I AM UNABLE TO EMPLOY A LAWYER, I HAVE THE RIGHT TO HAVE A LAWYER APPOINTED TO ADVISE ME PRIOR TO AND DURING ANY QUESTIONING; AND,

___ 5. I HAVE THE RIGHT TO TERMINATE THE INTERVIEW AT ANY TIME.

I THE UNDERSIGNED, RECEIVED THE FOREGOING WARNINGS, I FULLY UNDERSTAND EACH AND ALL OF THE RIGHTS CONTAINED IN THIS WARNING, I DO HEREBY KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVE ALL MY ABOVE RIGHTS. I MAKE THE FOLLOWING STATEMENT IN WRITING WITHOUT ANY THREATS OR PROMISES OF ANY KIND HAVING BEEN MADE TO ME.

MY NAME IS MICHAEL JAMES SCOTT, I AM 25 YEARS OLD, I WAS BORN ON 02/06/1974. I CURRENTLY LIVE AT 11157 F.M. 967, BUDA, TEXAS. MY HOME TELEPHONE NUMBER IS 894-0235. 1 AM UNEMPLOYED RIGHT NOW. MY SOCIAL SECURITY NUMBER IS 465-91-4376. MY TEXAS DRIVERS LICENSE NUMBER IS 11075970.

I AM CURRENTLY AT THE AUSTIN POLICE DEPARTMENT HOMICIDE OFFICE AT THE TWIN TOWERS GIVING THE STATEMENT TO DETECTIVE MANUEL FUENTES AND TEXAS RANGER SAL ABREO. I AM GIVING THIS STATEMENT ABOUT MY INVOLVEMENT IN THE DEATH OF THE FOUR GIRLS AT THE YOGURT SHOP ON DECEMBER 6TH, 1991. I HAVE PREVIOUSLY GIVEN ACCOUNTS OF WHAT HAPPENED IN 1991 AND AFTERWARDS TO DETECTIVE FUENTES, TEXAS RANGER SAL ABREO, DETECTIVE MERRILL, DETECTIVE RON LARA AND OTHER DETECTIVES. TODAY I TOLD DETECTIVE FUENTES AND TEXAS RANGER SAL ABREO THAT NOW THAT I HAVE CONFESSED TO MY FATHER AND MY BEST FRIEND PATRICK DAVIDSON IN MY PART IN THE GIRLS DEATH, I HAVE BEEN ABLE TO REMEMBER AND I WANT THIS STATEMENT TO BE CORRECT AND TRUTHFULL. THESE THINGS I WILL CLEAR UP IN THIS STATEMENT SUCH AS WHAT I THREW OFF THE BRIDGE AFTER THE MURDERS. I HAD PREVIOUSLY SAID THAT I THREW A SET OF KEYS OFF THE BRIDGE, IT WAS ACTUALLY A CUTTING KNIFE THAT 1 GOT FROM INSIDE THE YOGURT SHOP. AND WHEN I TOLD YOU THAT I DIDN'T REALLY REMMEBER WHAT HAPPENED TO THE SECOND GUN, THE SMALL SEMI AUTOMATIC PISTOL, I DO REMEMBER THAT I GAVE IT TO MY FRIEND PATRICK DAVIDSON IN DECEMBER 1992 SO THAT HE COULD GET RID OF IT. I DID NOT WANT TO

PULL HIM INTO THIS AND THAT IS WHY I HAD BEEN SO HESITANT TO TELL YOU WHAT HAPPENED TO THE GUN. IF SOMETHING HAPPENS TO HIM HE HAS NOTHING TO FALL BACK ON. I WILL EXPLAIN THIS MORE IN DETAIL LATER.

ON DECEMBER 6TH, 1991, I WAS WITH MY FRIENDS MAURICE, ROB SPRINGSTEEN AND FOREST. I WASN'T SURE ABOUT MAURICE AND FOREST'S LAST NAME. I HAD BEEN LIVING WITH ROB SPRINGSTEEN AT HIS FATHER CONDIMINIUM ON DRY CREEK DRIVE. I THINK THE APARTMENT WAS RIGHT ACROSS FROM THE SWIMMING POOL. WE WERE AT NORTHCROSS MALL SITTING AT A ROUND TABLE AT THE FOOD COURT. MAURICE BROUGHT UP THAT HE NEEDED TO GET SOME MONEY. I DON'T REMEMBER THE SPECIFICS ABOUT WHAT WAS DISCUSSED BUT I DO KNOW THAT THIS IS WHAT BROUGHT WHAT ALL THIS TO BE. MAURICE AND ROB TALKED ABOUT ROBBING A PLACE, A THEY SAID THAT THIS WOULD BE THE EASIEST WAY TO GET SOME MONEY. I GOT UP AND WALKED AROUND THE MALL. I REMEMBER BEING IN THE ARCADE AND THEN I REMEMBER COMING BACK TO THE TABLE AND SITTING DOWN. MAURICE GOT UP AND WALKED AROUND WITH SOMEBODY. I DON'T KNOW WHO IT WAS, I HAD SEEN HIM BEFORE BUT DIDN'T KNOW WHO HE WAS. RANGER ABREO ASKED ME WHAT TIME WAS THIS HAPPENING. I DON'T REMEMBER EXACTLY WHAT TIME IT WAS BUT IT WAS STILL DAYLIGHT. WE WERE ALL AT THE TABLE WHEN MAURICE SAID THAT WE NEEDED TO GO AND LOOK AROUND. I BELIEVED HIM TO MEAN THAT HE WANTED TO FIND A PLACE TO ROB. WHEN WE LEFT, MAURICE WAS DRIVING HIS DAD'S GREY FORD LTD. ROB WAS SITTING IN THE RIGHT FRONT SEAT. I SAT

BACK BEHIND THE DRIVER. FORREST WAS IN THE BACK SEAT WITH ME. WE DROVE AROUND AND LOOKED AT THE BUSINESSES AROUND THE NORTHCROSS AREA. WE DROVE UP TO THE STRIP MALL WHERE THE I CAN'T BELIEVE IT'S YOGURT SHOP WAS AT. WE LOOKED AT THE BUSINESSES THAT WERE AT THE MALL. MAURICE WAS THE ONE THAT SAID SOMETHING LIKE LETS GO INSIDE AND TAKE A LOOK AT THE YOGURT SHOP. MAURICE WENT IN AND BOUGHT A YOGURT SWIRL, CHOCOLATE AND VANILLA. I FOLLOWED ROB INSIDE. I SAT DOWN AND ROB CAME OVER AND SAID SOMETHING TO ME AND WE GOT UP AND MADE IT LOOK LIKE WE WERE GOING TO THE RESTROOM. MAURICE WAS UP AT THE COUNTER TALKING TO AT LEAST ONE OF THE GIRLS. I REMEBER THAT HE WAS TALKING TO THE DARK HAIRED GIRL. MAURICE WAS SUPPOSE TO DISTRACT THEM. ROB AND I WALKED OUT THE BACK AND WALKED AROUND TO THE FRONT OF THE BUILDING. WHEN WE GOT AROUND TO THE FRONT, MAURICE WAS ALREADY IN THE CAR EATING HIS YOGURT. WE DROVE BACK TO THE MALL AND WE SAT AT THE SAME TABLE. IT WAS THE SAME TABLE WE ALWAYS SAT AT. DETECTIVE FUENTES ASKED ME IF WE WERE ARMED AT THE TIME WE CASED THE STORE. NO, THE GUNS WERE LEFT INSIDE THE CAR AT THE TIME. WE SAT AT THE TABLE AND "BS'ING WITH FORREST. WE WERE JUST TALKING, NOT ABOUT WHAT WAS FIXIN TO HAPPEN. I REMEMBER EATING SOME CURLY FRIES AND IT WAS STRANGE THAT I REMEMBER A LARGE MEXICAN BOY THAT WE ALL KNEW IN PASSING WHO HAD COME SIT DOWN WITH US. THIS MEXICAN BOY PICKED UP THE BOAT CONTAINER OF KETSUP AND STARTED DRINKING IT. I WALKED AROUND THE MALL WITH

ROB. WE RAN INTO MAURICE AGAIN WHILE WE WERE WALKING AROUND. MAURICE TOLD US THAT IT WAS TIME TO GO. WE GOT BACK INTO HIS CAR. MAURICE WAS DRIVING, I WAS IN THE BACK SEAT AND ROB AND FORREST WHERE IN THE CAR WITH US. WE DROVE AROUND THE NEIGHBORHOOD MORE. I THINK WE WERE LOOKING FOR A ROUTE TO TAKE AND THERE WAS TALK ABOUT HOW OFTEN THE COPS DROVE AROUND AND IF THERE WAS A GENERAL ROUTE THEY DROVE AROUND IN. I KNOW IT WAS DARK WHEN WE LEFT NORTH-CROSS MALL. MOST OF THE BUSINESSES WERE CLOSED WHEN WE GOT OVER TO THE YOGURT SHOP. WE DROVE ACROSS THE PARKING LOT, AND DROVE THROUGH THE ALLEY BEHIND THE STORES. WE WANTED TO SEE IF THERE WAS ANY VEHICLES PARKED IN THE BACK OR IF THERE WERE ANY PEOPLE BACK THERE. I BELIEVE WE EVEN WANTED TO SEE IF THE BACK DOUBLE DOORS WERE STILL SLIGHTLY OPEN. WE DROVE BACK THROUGH THE PARKING LOT AND THEN BACK TO THE REAR OF THE STORE. I REMEMBER THE BUILDING WAS ON THE DRIVER SIDE, THE LEFT SIDE OF THE CAR. WE STOPPED JUST PAST THE DOUBLE DOORS, NOT MORE THAN 50 FEET PAST THE DOORS. MAURICE TOLD FORREST THAT THE ONLY THING HE HAD TO DO WAS HONK THE HORN IF ANYONE WAS COMING. MAURICE PULLED HIS GUN OUT. I BELIEVE THAT HE HAD IT IN BETWEEN SEAT. I KNOW ROB HAD A GUN BECAUSE HE LOOKED AT IT BEFORE WE WENT INSIDE TO MAKE SURE IT WAS LOADED. BEFORE WE WENT IN MAURICE TOLD ME TO MAKE SURE THAT I BROUGHT THE CAN OF ZIPPO LIGHTER FLUID. IT WAS THE BIGGER METAL CAN. TEXAS RANGER SAL ABREO ASKED ME WHY I THOUGHT WE BROUGHT

THE CAN OF LIGHTER FLUID. I BELIEVED MAURICE WANTED IT TO USE IT TO COVER OUR TRACKS. WE WENT INTO THE BACK DOOR. MAURICE WENT IN FIRST, THEN ROB AND THEN I FOLLOWED THEM. ONE OF THE GIRLS SAID SOMETHING LIKE, HEY YOU, WHAT ARE YOU DOING, YOU DON'T BELONG IN HERE. THIS GIRL WAS WEARING A T-SHIRT I BELIEVE THAT HAD THE NAME I CAN'T BELIEVE IT'S YOGURT ON IT. I BELIEVE THAT SHE WAS WORKING IN THE BACK ROOM WHEN WE ENTERED THE BACK. ROB TOLD ME TO STOP AND STAY RIGHT THERE AND NOT LET ANYONE OUT THE BACK. WE WERE ALL SURPRISED BECAUSE WE EXPECTED TO FIND ONLY TWO GIRLS INSIDE THE STORE AND THERE WERE TWO OTHER GIRLS UP FRONT IN THE DINNING ROOM AREA SITTING DOWN. I COULD SEE THE COMOSION GOING ON UP FRONT. I REMEMBER MAURICE TOLD ME TO CHECK THE FRONT DOOR TO MAKE SURE IT WAS LOCKED. HE ALSO TOLD ME TO CHECK TO SEE IF THERE WAS ANYONE OUT FRONT THAT COULD SEE US. I CHECKED THE DOOR AND IT WAS LOCKED. THERE WAS ONE KEY IN THE LOCK. THE DOOR WAS LOCKED. I LOOKED OUT SIDE TO MAKE SURE NO ONE WAS LOOKING IN. AS THIS WENT ALONG I GOT MORE AND MORE SCARED. I HEARD THE CASH REGISTER OPEN. I HEARD THE DRAWER BEING LIFTED AND SLAMMED BACK. I SAW MAURICE AT THE CASH REGISTER AND I SAW HIM PUT SOMETHING IN HIS POCKET. I THOUGHT TO MYSELF THAT HE HAD JUST PUT MONEY IN HIS POCKET. ALL THE GIRLS WERE IN THE BACK WITH ROB. I LOOKED OUT TO CHECK THE FRONT AGAIN. I HEARD MAURICE SAY SOMETHING LIKE WHERE IN THE FUCK IS THE REST OF THE MONEY. I HEARD THE GIRLS CRYING AND ONE OF THE GIRLS SAY

THAT THAT'S ALL THERE IS, IT'S ALREADY BEEN DROPPED AND YOU CAN'T GET TO IT. I HEARD ROB SAY COME HELP ME WITH THIS. I WENT BACK THERE AND HE WANTED HELP TYING THEM UP. WHEN I WENT BACK THERE, I SAW THAT ALL FOUR GIRLS WERE NAKED. I BELIEVE THIS IS THE WAY THAT IT WAS BECAUSE I DON'T REMEMBER PULLING THEIR CLOTHES OFF. I WENT TO THE PILE OF THE CLOTHES AND PICKED UP SOME CLOTHES TO USE TO TIE THEM UP. I REMEMBER A T-SHIRT AND A BRA THAT WE USED TO TIE THEM UP. THE GIRLS WERE CRYING AND WIMPERING. THEY WERE BEGGING FOR US NOT TO KILL THEM. THEY SAID THAT THEY DIDN'T WANT TO DIE. I GOT A PAPER TOWEL AND PUT IT INSIDE ONE OF THE GIRLS MOUTH. I REMEMBER THAT MY FINGER PUSHED THROUGH THE TOWEL WHEN I WAS TRYING TO STUFF IT IN HER MOUTH. THIS MAY NOT HAVE WORKED I MIGHT HAVE HAD TO USE SOMETHING ELSE TO STUFF IN HER MOUTH. IT WAS WHITE LIKE TERRY CLOTH. THE GIRLS WERE ON THEIR KNEES. I DON'T BELIEVE THEY WERE STANDING UP BECAUSE I WAS LOOKING DOWN AT THEM. ROB TOLD ME TO CHECK THE FRONT AGAIN. I WENT UP FRONT AND REMEMBER WHAT SOUNDED LIKE ONE OF THE GIRLS TRYING TO SCREAM. MAURICE WAS SCREAMING SAYING "WHERE THE FUCK IS THE REST OF THE MONEY". I HEARD A BANG, A CRACK. IT SOUNDED LIKE A GUN GOING OFF. I CHECKED THE LOCK ONE LAST TIME AND TURNED AROUND TO GO SEE WHAT HAPPENED. ONE OF THE GIRLS WAS ALREADY DEAD. I THINK MAURICE SHOT THAT ONE. AFTER THE SHOT MAURICE SAID AGAIN, WHERE IN THE FUCK IS THE REST OF THE MONEY AND THERE WAS A SECOND SHOT. I WENT TO THE BACK AND SAW ROB AND HE HAD ONE OF THE

DARK HAIRED GIRLS ON HER HANDS AND KNEES AND HE'S RAPING HER, RAPING HER HARD. I TOLD ROB THAT THIS WASN'T RIGHT, THAT'S NOT WHAT HE CAME HERE FOR. ROB STOOD UP I DON'T KNOW IF HE FINISHED, I DID NOT SEE HIS DICK. I KNOW THAT MAURICE WAS NOT BACK THERE WITH ROB. MAURICE HAD GONE INTO AN OFFICE AND HE HAD ONE OF THE GIRLS WITH HIM. SHE WAS SQUATED DOWN AND I THINK SHE WAS TRYING TO OPEN A SAFE OR SOMETHING. ROB TOLD ME TO DO ONE OF THE GIRLS. I BELIEVE IT WAS THE ONE THAT HE JUST DID. HE TOLD ME NOT TO BE A PUSSY AND TOLD ME THAT IF I DIDN'T THEN I WAS NEXT. WE LAID THE GIRL ON THE FLOOR AND I GOT ON TOP OF HER. I TRIED TO DO HER FROM THE FRONT. I LOOKED AT HER FACE, I DIDN'T WANT TO LOOK AT HER FACE. SHE HAD A PIECE OF A WHITE TERRY CLOTH TOWEL ON HER MOUTH. I LOOKED AWAY BECAUSE I DIDN'T WANT TO SEE HER. I COULDN'T GET IT UP BECAUSE I KNEW THAT WHAT I WAS DOING WAS WRONG. I SORT OF FAKED IT TO MAKE ROB THINK THAT I DID HER. I GOT UP AND REMEMBER EITHER MAURICE OR ROB TELLING ME TO FINISH HER. I REMEMBER GRABBING THE REVOLVER FROM MAURICE. HE TOLD ME TO FINISH HER. THE GIRL WAS STILL ON THE FLOOR. I POINTED THE GUN AT HER AND TRIED TO SHOOT AT FIRST BUT COULDN'T. MAURICE TOLD ME TO DO IT OR I WOULD BE NEXT. I POINTED THE GUN AGAIN AT THE GIRL AND FIRED ONCE INTO HER HEAD. I REMEMBER ROB PUSHED ME TOWARD MAURICE. MAURICE WAS IN THE OTHER ROOM WITH THE OTHER GIRL. I DON'T REMEMBER SEEING A SAFE BUT I DON'T REMEMBER WHAT SHE WAS DOING DOWN ON THE FLOOR. I REMEMBER LOOKING IN THE DOORWAY AND THE GUN IS STILL

IN MY HAND. MAURICE ASKED ROB IF I DID IT AND ROB SAID "YEA HE FINISHED HER". MAURICE TOLD ME "YOUR IN THIS NECK DEEP ALREADY". I SAW THE SIDE PROFILE OF THIS GIRL. SHE HAD LIKE A WHITE SHIRT ON. I THINK SHE HAD DARK HAIR. ROB WAS STANDING RIGHT THERE AND HE HAD THE SMALL SEMI AUTOMATIC GUN. ROB TOLD ME NOT TO ME BE A PUSS. I THINK I SHOT HER IN THE HEAD. I'VE BEEN NOT WANTING TO REMEMBER THIS. I KNOW I'VE TOLD YOU SOMETHING DIFFERENT, BUT I DID HER TOO BECAUSE MAURICE AND ROB WERE PRESSURING ME. I DROPPED THE REVOLVER. MAURICE WAS MAD AT ME HE ASKED ME WHERE THE LIGHTER FLUID WAS AND I THOUGHT I LEFT IT IN THE CAR. HE TOLD ME TO GO OUT TO THE CAR AND GET IT. I LOOKED AT FORREST AND THEN I LOOKD AT THE FLOOR BOARD AND PICKED UP THE LIGHTER FLUID. FORREST DIDN'T SAY A WORD. I WENT BACK INSIDE. ROB TOLD ME TO BURN THE PLACE. I SAW THE GIRLS LAYING THERE AND I PULLED ONE OF THE GIRLS ON TOP OF THE OTHER. ROB WAS WATCHING ME AS I GATHERED UP NAPKINS, CUPS AND PAPER TOWELS AND PILED THEM ON TOP OF THE THREE GIRLS. I SPRAYED ZIPPO FLUID ON TOP OF THE GIRLS. I EMPTIED THE CAN OF LIGHTER FLUID. I HAD A ZIPPO LIGHTER WITH ME AND LIT THE FIRE. I HEARD A WOOSH SOUND OF THE EXCELLERANT WHEN IT CAUGHT FIRE. I DON'T REMEMBER WHAT I DID WITH THE CAN, I COULD HAVE THREW IT IN THE PILE OF STUFF IN THE BACK OF THE STORE. I REMEMBER THAT MY ONLY THOUGHT WAS TO GET OUT. I WENT OUTSIDE AND REMEMBERED THAT FORREST WAS NOT IN THE CAR ANYMORE. I HAD TAKEN A KNIFE FROM INSIDE THE SHOP.

I BELIEVE I GOT IT OFF THE COUNTER. IT WAS A NICE KNIFE. I TOLD YOU ALL BEFORE THAT I HAD TAKEN A SET OF KEYS, BUT IT WAS A KNIFE, I REMEMBER NOW THAT IT WAS A KNIFE. ROB AND I WERE ALREADY BACK IN THE CAR. WHEN MAURICE GOT THERE, I ASKED MAURICE WHERE FORREST WAS HE SAID THAT HE MUST OF TOOK OFF. TEXAS RANGER SAL ABREO ASKED ME HOW LONG WHERE WE IN THE SHOP. I THINK WE WERE IN THERE ABOUT 20 TO 25 MINUTES, I AM NOT SURE. WE WERE IN THE CAR AND ON THE WAY OUT WE SAW FORREST, HE WAS IN THE PARKING LOT SOMEWHERE AND WE PICKED HIM UP.

I REMEMBER DRIVING, BUT I DON'T REMEMBER WHAT DIRECTION WE WENT. WE STOPPED AT SOME BRIDGE. IT WAS ABOUT 10 TO 15 MINUTES AWAY FROM THE SHOP. I GOT OUT AND THREW UP OVER THE RAILING OF THE BRIDGE. I TOOK THE KNIFE AND THREW IT OVER THE RAIL ALSO. I MADE SURE IT WAS GONE. I REMEMBER TREES AND I DON'T REMEMBER SEEING ANY WATER. I GOT BACK INTO THE CAR. I DONT KNOW WHAT HAPPENED NEXT, I REMEMBER BEING BACK AT THE APARTMENT. DETECTIVE FUENTES ASKED ME TO DESCRIBE THE TWO GUNS. THE GUN THAT MAURICE HAD WAS A BLACK 22 CALIBER REVOLVER, SMALL, I THINK IT HAD WOOD GRIPS. THE GUN THAT ROB HAD WAS A SMALL SEMI AUTOMATIC PISTOL, IT HAD A CLIP, I THINK IT WAS A 38, SOME OF THE WRITING ON THE GUN WAS SCRATCHED OFF. ROB AND I SPLIT UP FROM MAURICE AND FORREST. ROB AND I SPENT SOME TIME AT THE APARTMENT. I REMEMBER ON THE WEEKEND THAT I GOT INTO A YELLOW OR GOLD JEEP TO SEE MARY. MARY IS A GIRL THAT I MET AT MUSIC CAMP WHO LIVES IN HELOTES, WHICH IS NEAR SAN ANTONIO. MAURICE WAS

DRIVING AND I THINK FORREST WAS WITH US. ROB AND I RODEWITH THEM TO SAN ANTONIO. WE STAYED THERE MAYBE AN HOUR. I GOT A HOLD OF A NEWSPAPER AND I REMEMBER READING ABOUT THE FIRE AND THE YOGURT SHOP MURDERS. I READ IT OUT LOUD TO EVERYBODY. WE DROVE BACK TO AUSTIN. I REMEMBER GETTING BACK HOME AND WANTING TO DO NOTHING MORE THAN SLEEP. SEVERAL DAYS AFTER WE GOT BACK FROM SAN ANTONIO, ROB CAME INTO THE ROOM WE SLEEP IN AND TOLD ME THAT MAURICE GOT POPPED WITH THE GUN THAT THEY USED AT THE YOGURT SHOP. THE SEMI AUTOMATIC WAS LAYING ON THE BED.

I KNEW THAT I HAD TO GET RID OF IT. I PICKED IT UP AND LEFT THE APARTMENT. I REMEMBER WALKING PAST A DUMPSTER AND THINKING THAT I SHOULD JUST THROW IT IN THE DUMPSTER. I WALKED INTO THE CREEK IN THE APARTMENT COMPLEX. I PUT IT IN A HOLE IN THE SIDE OF THE WALL IN THE CREEK. I WEDGE ANOHER ROCK IN IT. I STACKED SOME ROCKS NEAR IT AS A MARKER TO REMIND ME WHERE IT PUT IT. I WENT BACK AND TOLD ROB THAT GOT RID OF IT AND THAT NO ONE WOULD EVER FIND IT. LESS THAN A MONTH LATER ROB TOOK OFF. I HAD MOVED OUT FROM DRY CREEK AND WAS STAYING AT MY PARENTS HOUSE AGAIN. WHEN I WENT BACK TO ROB'S APARTMENT TO GET SOME OF MY THINGS, ROB'S DAD TOLD ME THAT ROB WENT BACK TO WHERE EVER HE CAME FROM. I USED TO REMEMBER WHERE THAT WAS, BUT I DON'T REMEMBER NOW. A COUPLE OF MONTHS LATER I MET THIS GUY NAME PATRICK DAVIDSON THAT I MET AT DOUBLE DAVES. WE MOVED IN WITH THESE GUYS NAMED DANNY AND DANIEL. IN DECEMBER OF 1992, I WAS SMOKING A

LOT OF POT. I HAD BEEN DRINKING A LOT TOO AND STARTED HAVING FLASHBACKS. I WENT BACK OUT TO THE CREEK AND FOUND THE GUN. I TOOK THE GUN AND PUT IT IN A BROWN PAPER BACK THAT I FOUND IN THE CREEK. I TOOK THE GUN BACK TO SOUTH AUSTIN TO OUR APARTMENT. I TOLD PAT A LITTLE BIT. I DON'T REMEMBER HOW MUCH I TOLD HIM BUT I DO REMEMBER THAT I TOLD HIM THAT I WOULDN'T HAVE DONE IT IF I HAD NOT BEEN FORCED TO DO IT. I TOLD PAT THAT I NEEDED TO GET RID OF WHAT WAS IN THE SACK. I DIDN'T TELL HIM. I ASKED HIM IF HE WANTED TO KNOW AND HE SAID NO. HE TOLD ME THAT HE PUT IT OUT IN THE TRASH. YESTERDAY WHEN I TOLD HIM WHAT WAS GOING ON AND TOLD HIM THAT I WAS IN TROUBLE, HE SAID THAT HE PRETTY MUCH KNEW THAT THERE WAS A GUN IN THE SACK WHEN I GAVE IT TO HIM IN 1992.

DETECTIVE FUENTES ASKED ME WHO I HAVE TOLD ABOUT THE MURDERS. MY DAD CAME OVER TO MY HOUSE THIS PAST SUNDAY. I TOLD HIM WHAT WAS GOING ON BUT DID NOT GIVE HIM A LOT OF DETAILS. HE'S A SMART MAN HE FIGURED OUT WHAT I WAS TALKING ABOUT WHEN I TOLD HIM THAT IT HAPPENED BACK AROUND 7 YEARS AGO. I THINK HE ALWAYS SUSPECTED THAT I WAS SOMEHOW INVOLVED BACK IN 1991 BECAUSE OF WHO I WAS HANGING OUT WITH. WE HUGGED SEVERAL TIMES AND HE KINDA STARTED TO CRY. I CAN NOT TELL MY MOTHER BECAUSE THIS WOULD DESTROY HER. I TOLD MY WIFE, BUT I DID NOT GIVE HER DETAILS. SHE IS REAL UPSET WITH ME RIGHT NOW. WE TALKED ABOUT WHETHER I SHOULD GET A LAWYER RIGHT NOW AND I TOLD HER THAT THAT WAS THE LAST THINK I NEEDED RIGHT NOW. YESTERDAY, RIGHT AFTER I DROPPED

MY DAUGHTER OFF AT DAYCARE, I WENT NEXT DOOR TO USE THE PAYPHONE AND I CALLED THE ATTORNEY BETTY BLACKWELL. I TOLD HER THAT IT INVOLVED THE YOGURT SHOP MURDERS AND THAT I WAS TALKING TO THE POLICE. SHE RECOMMENDED THAT I STOP TALKING TO YOU ALL. SHE TOLD ME THAT WHO EVER THEY PIN THIS ON, THEY ARE LOOKING FOR THE DEATH PENALTY. SHE TOLD ME THAT SHE DID NOT HANDLE CASES LIKE THIS. SHE TOLD ME THAT I DIDN'T SOUND TO GOOD AND THAT I SHOULD SEEK HELP LIKE CHECKING INTO SHOAL CREEK OR SOMETHING LIKE THAT. I TOLD MY BEST FRIEND PATRICK DAVIDSON AND HE WAS PISSED OFF AT ME. WHEN HE GOT RID OF THE GUN FOR ME IN 1992 HE DIDN'T KNOW WHAT I HAD DONE WITH IT. HE SAID THAT HE PRETTY MUCH KNEW IT WAS A GUN WHEN HE THREW IT AWAY.

THE OTHER DAY WHEN I WAS BEING INTERVIEWED BY DETECTIVE LARA AND DETECTIVE MERRILL, THEY SHOWED ME DIGITAL PHOTOGRAPHS ON THEIR COMPUTER OF THE PEOPLE I HAVE BEEN TALKING ABOUT WHEN I USED THE NAMES MAURICE, ROB SPRINGSTEEN AND FORREST. I RECOGNIZED MAURICE AND ROB, BUT I HAD A HARD TIME WITH FORREST'S PHOTOGRAPH. I HAD KNOWN MAURICE FOR ABOUT 2 OR 3 MONTHS BEFORE THE MURDERS. I MET MAURICE THROUGH ROB. I HAD SEEN MAURICE ALMOST EVERY TWO OR THREE DAYS DURING THAT TIME PERIOD. I HAD KNOWN ROB SPRINGSTEEN ABOUT MAYBE SIX MONTHS AND HAD BEEN STAYING WITH HIM FOR ABOUT A COUPLE OF MONTHS. FORREST IS A GUY THAT I KNEW THROUGH MCCALLUM HIGH SCHOOL. I WOULD SEE HIM AT SCHOOL AND NORTHCROSS MALL.

I REMEMBER WHEN WE WERE IN MAURICE'S CAR LEAVING THE SHOP, MAURICE HAD THREATENED EVERYBODY IN THE CAR. I DON'T REMEMBER EXACTLY WHAT HE SAID. LATER, ROB HAD TOLD ME WHEN WE WERE AT HIS APARTMENT THAT IF I EVER SAID ANYTHING, IT WOULD ALL COME BACK TO ME. HE SAID THAT HE WOULD DENY EVERYTHING.

I CAN READ, WRITE, AND UNDERSTAND THE ENGLISH LANGUAGE AND THE ABOVE STATEMENT I HAVE READ AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

/s/ [Illegible]
Signature

/s/ [Illegible]
Witness

/s/[Illegible]
Witness